No. 11145

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, a Delaware Corporation, of Saint Paul, Minnesota, and LIVERMORE WINERY, INCORPORATED, a California Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

FILED
JAN 2 1946
PAUL P. O'BRIEN,
CLERK

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11145

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, a Delaware Corporation, of Saint Paul, Minnesota, and LIVERMORE WINERY, INCORPORATED, a California Corporation,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Affidavit of Albert S. Guerard in Opposition to Defendants' Motion to Set Aside Judgment 46

Affidavit of Robert H. Fouke in Support of Motion to Set Aside Judgment 42

Amended Answer to Complaint 22

Appeal:

Certificate of Clerk to Transcript of Record on 62

Cost Bond on 50

Designation of Record on (CCA) 191

Designation of Record on (DC) 53

Notice of 49

Orders Extending Time to Docket.... 56, 57

Statement of Points on (CCA) 186

Statement of Points on (DC) 57

Stipulation and Order re Exhibits on.... 54

Certificate of Clerk to Transcript of Record on Appeal 62

INDEX

PAGE

Complaint 2

1—Assessment Certificate 10

4—Fruit-Distiller's Bond No. 11235..... 13

5—Letter, May 25, 1939, to Livermore Winery and Saint Paul Mercury-Indemnity Company, signed J. H. Maloney, District Supervisor 20

Cost Bond on Appeal 50

Designation of Record on Appeal:
Defendants and Appellants (DC)..... 53
Appellants (CCA) 191

Findings of Fact and Conclusions of Law..... 34

Judgment for Plaintiff 40

Minute Order of June 25, 1945—Denying Motion to Set Aside Judgment..... 49

Motion to Deny Motion to Set Aside Judgment 44

Names and Addresses of Attorneys 1

Notice of Appeal 49

Notice of Motion to Set Aside Judgment..... 41

Order Denying Motion to Set Aside Judgment 49

Orders Extending Time to Docket Appeal.. 56, 57

Order for Entry of Judgment 33

Statement of Points on Appeal:
Appellants (CCA) 186
Appellants (DC) 57

INDEX PAGE

Stipulation and Order re Exhibits on Appeal.. 54

Transcript of Testimony 63

Witnesses for Defendants:

Antonini, G. B.

—direct 145

—cross 154

—redirect 159

Granucci, Guido

—direct 168

—cross 176

Groci, Guiseppe

—direct 178

—cross 179

Maloni, John

—direct 161

—cross 166

Witnesses for Plaintiff:

Bulfinch, Arthur F.

—direct 85

—cross 107, 127

—redirect 134

Jones, Almon C.

—direct 82

—cross 84

Woods, Margaret

—direct 67

—cross 75

NAMES AND ADDRESSES OF ATTORNEYS

ROBERT H. FOUKE,

HANS A. KRUGER,

1565 Russ Building,

San Francisco, California.

Attorneys for Defendants and Appellants.

FRANK J. HENNESSY,

United States Attorney,

Northern District of California,

Post Office Building,

San Francisco, California.

Attorneys for Plaintiffs and Appellee.

In the District Court of the United States for the Northern District of California, Southern Division

No. 22591-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, a Delaware Corporation, of Saint Paul, Minnesota,

and

LIVERMORE WINERY, INCORPORATED, a California Corporation,

Defendants.

COMPLAINT TO ENFORCE COLLECTION OF INTERNAL REVENUE TAXES UPON DISTILLED SPIRITS AND TO ENFORCE COLLECTION THEREOF UPON BOND GIVEN TO GUARANTEE PAYMENT OF SAME

Now comes Frank J. Hennessy, United States Attorney for the Northern District of California, and respectfully presents to the Court the following: [1*]

*Page numbering appearing at foot of page of original certified Transcript.

FOR A FIRST CAUSE OF ACTION

I.

This is an action arising under a law providing for Internal Revenue to enforce the collection of Internal Revenue taxes upon distilled spirits. It is authorized by the Commissioner of Internal Revenue and commenced at the direction of the Attorney General of the United States, in accordance with the requirements of Section 3740 of Title 26, U. S. Code, of which action this Court has jurisdiction by virtue of the provisions of Section 41, subdivisions 5 and 9, of Title 28, U. S. Code.

II.

The defendant, Livermore Winery, Incorporated, of Livermore, California, now is and at all times hereinafter mentioned, was a corporation organized and existing under and by virtue of the laws of the State of California.

III.

The defendant, Livermore Winery, Incorporated, at all times mentioned hereinafter was a distiller as defined by the provisions of Section 1158, Title 26, U. S. Code (1934 Edition) carrying on business at Fruit Distillery No. 306 located on property situated at the northeast corner of Third and Church Streets, Livermore, California, within the First Collection District of California and within the Northern Judicial District of California.

IV.

During all of the times hereinafter mentioned,

there was imposed upon distilled spirits by Section 1150 (a)(1) of Title 26, U. S. Code (1934 Edition) as amended and supplemented, a tax of $2.00 per proof gallon, which said tax, said section of law further provided, attached to said distilled spirits when they came into existence as such. Further, subdivision (d) of said Section 1150, U. S. Code, provided that "Every proprietor or possessor of, and every person in any manner interested in the use of, any still, [2] distillery, or distilling apparatus, shall be jointly and severally liable for the taxes imposed by law on the distilled spirits produced therefrom." Said section 1150, Title 26, U.S. Code (1934 Edition) further provides in subdivision (b) thereof as follows:

"(b) Time for payment; bonded distilled spirits; distilled spirits not bonded. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 1432, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law. (R. S. Sec. 3253.)"

V.

The defendant, Livermore Winery, Incorporated,

distilled at its said Fruit Distillery No. 306 during the month of December, 1936, the 1619.56 proof gallons (tax gallons) of distilled spirits, to wit, brandy, hereinafter mentioned.

VI.

On December 26 and 27, 1936, the defendant, Livermore Winery, Incorporated, removed from the premises of said Fruit Distillery No. 306, said 1619.56 proof gallons (tax gallons) of distilled spirits, to wit, brandy, and the tax imposed thereon by said Section 1150, Title 26, U. S .Code (1934 Edition), thereby became due and payable.

VII.

On April 23, 1937, the Commissioner of Internal Revenue, in compliance with law, levied and assessed against the defendant, [3] Livermore Winery, Incorporated, a tax of $3,239.00 upon the said 1619.56 proof gallons of distilled spirits, to wit, brandy, removed as set forth in paragraph VI, a copy of which assessment is attached hereto as Exhibit 1.

VIII.

On May 4, 1937, the Collector of Internal Revenue, First Collection District of California, by mailing to said Livermore Winery, Incorporated, a Notice and Demand for Tax, a copy of which is attached hereto as Exhibit 2, notified the said Livermore Winery, Incorporated, of the assessment of the tax aforesaid, and demand that payment thereof be made.

IX.

On May 15, 1937, the Collector of Internal Revenue, First Collection District of California, by mailing to said Livermore Winery, Incorporated, a Second Notice and Demand for Tax, a copy of which is attached hereto as Exhibit 3, again notified Livermore Winery, Incorporated of the assessment of the tax aforesaid, and in addition thereto, a 5% penalty of $161.92, interest of $5.82, in accordance with the provisions of Section 1545, Title 26, U. S. Code (1934 Edition) and demanded that payment thereof be made on May 25, 1937.

X.

The defendant, Livermore Winery, Incorporated, has neglected and refused and failed to pay the said tax, penalty and interest, and continues to neglect and refuse and fail to pay the same.

XI.

The defendant, Livermore Winery, Incorporated, owes to plaintiff, the amount of said tax, to wit, $3,239.00 together with a penalty of 5% on $3,239.00 in the amount of $161.92 and interest on $3,239.00 at the rate of 6% per annum from May 4, 1937 to date [4] of payment, as provided by Section 1545, Title 26, U. S. Code (1934 Edition) (now Section 3655, Title 26, U. S. Code) as amended and supplemented.

FOR A SECOND CAUSE OF ACTION

I.

This is a Cause of Action upon a bond entered into under and by virute of the Internal Revenue Laws of the United States, through which the United States seeks to collect a sum of money equivalent to certain Internal Revenue taxes on distilled spirits, together with penalties and interest upon said sum. It is authorized by the Commissioner of Internal Revenue and commenced at the direction of the Attorney General of the United States, in accordance with the requirements of Section 3740 of Title 26, U. S. Code, of which action this Court has jurisdiction by virtue of the provisions of Section 41, subdivisions 5 and 9 of Title 28, U. S. Code.

II.

Paragraphs II, III, IV, V, VI, VII, VIII, IX and X of the First Cause of Action, are incorporated herein by reference.

III.

The defendant, Saint Paul Mercury-Indemnity Company of Saint Paul, of Saint Paul, Minnesota, now is and at all times hereinafter mentioned, was a corporation.

IV.

As required by law, the defendant, Livermore Winery, Incorporated, as principal, and the defendant, Saint Paul Mercury-Indemnity Company of Saint Paul, as surety, on the 6th day of November 1936, affective as of June 26, 1936, executed a

written instrument entitled "United States Internal Revenue Fruit-Distiller's Bond," a copy of which is attached hereto as Exhibit 4, by which the principal and surety bound themselves jointly and severally to the plaintiff in the sum of Forty-Three Thousand Five Hundred Dollars [5] ($43,500.00) and which provided that: The subject bond was given to conform to the provisions of Section 3260 of the U. S. Revised Statutes in connection with the operations of Livermore Winery, Incorporated, as a distiller on and after the 26th day of June 1936 at premises designated as Registered Distillery No. 306; and that the said bond was intended to cover all brandy produced by the distiller at the said distillery during the period of one year, from June 26, 1936 to April 30, 1937; and to guarantee that the principal would in all respects comply with law and regulations relating to the duties and business of distillers of brandy and would pay all penalties incurred or fines imposed on him for a violation of any such laws or regulations; that he would not suffer the land on which the distillery stood or any distilling apparatus, to be encumbered by mortgage, judgment, or other lien, during the time when he carried on the business of a distiller; and that he would pay or cause to be paid all taxes at the rate imposed by law therein in force, plus penalties and interest on brandy produced by the distiller. Such bond further provided that it should extend and apply equally to any change in the business address of the premises, the extension or curtailment of them, including the buildings or any part

thereof or any equipment or any other change which would require the distiller to file a new or amended notice Form 27½, excepting where the change should constitute a change in the proprietorship of the business or in the location of the premises.

V.

On May 25, 1939, the District Supervisor of the 14th District of the Alcohol Tax Unit, Bureau of Internal Revenue, acting with the authorization and upon the instructions of the Commissioner of Internal Revenue, mailed to the defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, a letter, a copy of which is attached hereto as Exhibit 5, demanding [6] that said defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company, pay the said tax together with penalty and interest thereon.

VI.

The defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, have neglected and refused and failed to pay the said tax, penalty and interest, and continue to neglect and refuse and fail to pay the same.

VII.

The defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, jointly and severally owe to plaintiff, the amount of said tax, to wit, $3,239.00 to-

gether with a penalty of 5% on $3,239.00 in the amount of $161.92, and interest on $3,239.00 at the rate of 6% per annum from May 4, 1937 to date of payment, as provided by Section 1545, Title 26, United States Code (1934 Edition) as amended and supplemented.

Wherefore, plaintiff prays judgment against the defendants Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, jointly and severally, in the amount of $3,239.00 together with interest, penalties and the costs of this suit, and for such other relief as this Honorable Court shall deem just and proper.

Dated April 15, 1943.

FRANK J. HENNESSY,
United States Attorney

. . . . . .
Assistant U. S. Attorney [7]

EXHIBIT No. 1

Form [Illegible]—(Revised). Treasury Department, Internal Revenue Service. Form approved by Comptroller General, U. S., September 26, 1940.

Received May 1, 1937, Collector of Int. Rev., First Dist. Calif.

ASSESSMENT CERTIFICATE

First District of California, March, 1937

Distilled Spirits Tax Division

Lists as to tax and payments compared and found to agree with sectional control ledgers.

Thomas J. Church, Chief of Division

Frank L. Blote, Bookkeeper.

I hereby Certify that the individuals, firms, and corporations reported by me on the attached lists are liable for the amount of taxes, penalties, etc., entered opposite their names or identification numbers, and that the amounts thereof are as follows:

Date April 1, 1937.

John V. Lewis,
Collector of Internal Revenue

List	Returns Filed	Excess Collections	Total Tax
March 1937—Dist Sprts	13,023.54	52.09	13,075.63
March 1937—Rectifier	4,521.52		4,521.52
March 1937—Penalties	6,771.41	2.51	6,773.92
March 1937—Brandy	3,008.43		3,008.43
Totals reported by collector	27,324.90	54.60	27,379.50
Differences found by commissioner	00	00	00
Items reported by commissioner	15,589.57	00	15,589.57
Total assessment	(42,914.47)	54.60	42,969.07

I Hereby Certify that I have made inquiries, determinations, and assessments of taxes, penalties,

etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due as shown, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C., Office of Commissioner of Internal Revenue, April 23, 1937.

Guy T. Helvering,

Commissioner of Internal Revenue

FP-OGG-R1

INSTRUCTIONS

This form must be made each month in quadruplicate by each tax division. The original and first copy must be forwarded with the duplicate copies of the monthly lists (Form 23A) to the Commissioner within 10 days after the close of the month. The second copy must be submitted with the original and duplicate Form 820 to the Accounts and Collections Unit within 5 days after the close of the month. One copy of this certificate (Form 23C) will be returned to the collector accompanied by a statement of difference on Form 23D (if errors are found), and by additional sheets (Form 23A) containing items assessed additionally by the Commissioner.

Form 23A—Treasury Department, Internal Revenue Service. Revised March, 1922.

Page No. 504

ASSESSMENT LIST

First District of California, Stilled Spirits,
List March, 1937

	Debit	New Balance	Remarks
Livermore Winery, Inc., Livermore, Calif.	3239.00	3239.00	Tax on 1619.56 pg Bdy (Lost through negligence) 12-26 & 27-36.

(Here follows Exhibits 2 and 3, which are the same as Plaintiff's Exhibit No. 7.)

EXHIBIT No. 4

Bond No. 11235 Executed in Triplicate

The premium charge for this bond is
$174 per annum

Form 30½, Treasury Department, Internal Revenue Service (Revised July 1935)

United States Internal Revenue

Superseding Bond Office Copy

FRUIT-DISTILLER'S BOND

(This Bond must be executed by every Distiller before commencing business, and on the 1st day of May in each succeeding year, as required by Sec. 3260 U. S. Rev. Stat.)

Know All Men By These Presents, That I (we) Livermore Winery, Incorporated, a California cor-

poration, of Third and Church Streets, Livermore, California, as principal (hereinafter designated as principal) and Saint Paul-Mercury Indemnity Company, of Saint Paul, a Delaware Corporation, of Saint Paul, Minn., authorized to act as surety in the State of California, as surety (or sureties), are held and firmly bound unto the United States of America in the sum of Forty-three thousand five hundred dollars ($43,500.00), lawful money of the United States for the payment of which we bind ourselves, our heirs, executors, administrators, successors, and assign, jointly and severally, firmly by these presents.

Whereas, every person intending to commence or to continue the business of a distiller shall give bond in accordance with the provisions of section 3260, United States Revised Statutes; and

Whereas, the principal is now engaged, or intends to be engaged on and after the 26th day of June, 1936, in business as a distiller of brandy under the name or style of Livermore Winery, Incorporated, within the 14th District, to wit, at Registered Distillery No. 306, located at N. E. Corner Third and Church Streets, Livermore, California; and

Whereas, this bond is intended to cover all brandy produced by the principal at the said distillery during a period of 1 year from June 26, 1936 to April 30, 1937.

Now, therefore, the conditions of this bond are such that if the principal—

1. Shall, in all respects, faithfully comply with all the provisions of law and regulations made in pursuance thereof relating to the duties and business of distillers of brandy; and

2. Shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions; and

3. Shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment, or other lien, during the time in which he shall carry on said business; and

4. Shall pay or cause to be paid all taxes at the rate imposed by law now or hereafter in force (plus penalties, if any, and interest) on brandy produced by him;

Then this obligation is to be null and void, but otherwise to remain in full force, virtue, and effect.

We, the obligators, also agree that all stipulations, covenants, and agreements of this bond shall extend to and apply equally to any change in the business address of the premises, the extension or curtailment of the premises, including the buildings thereon, or any part thereof, or in equipment, or any other change which requires the principal to file a new or amended notice (Form 27½), except where the change constitutes a change in the prop-

rietorship of the business, or in the location of the premises.

Witness our hands and seals this 6th day of November, 1936.

Signed, sealed, and delivered in the presence of

(Seal) LIVERMORE WINERY, INCORPORATED,

(Seal) By [Illegible.]
Attorney in fact.

(Seal) [Illegible.]

All erasures, interlineations or alterations on the within bond were made prior to the signing of same. [11]

Form 30½, Internal Revenue Service

FRUIT-DISTILLER'S BOND

Livermore Winery Incoporated
F. D. #306
Third & Church Sts.,
Livermore, California

District No. 14

SUPERVISOR'S APPROVAL

I hereby approve the foregoing bond, the same being executed in due form and the sureties thereon being satisfactory to me; and I hereby certify that the persons signing said bond on behalf of the

principal are fully empowered to do so, as appears by properly executed authority on file in my office.

December 1st, 1936.

J. H. MALONEY,
District Supervisor

Treasury Department, Bureau of Internal Revenue
Alcohol Tax Unit

....., 193...

Respectfully referred to the Commissioner of Accounts and Deposits, Section of Surety Bonds, Treasury Department, for examination and approval as to the within corporate surety, and return to this Bureau.

.....
Deputy Commissioner

Treasury Department, Office of Commissioner of
Accounts and Deposits, Section of Surety Bonds

....., 193..

Examined and approved as to the within corporate surety.

.....
Commissioner of Accounts and Deposits

INSTRUCTIONS

1. This bond must be filed in triplicate with the District Supervisor for the district in which the distillery premises are located.

2. The name, including the full given name, of each individual party to the bond must be written in the heading thereof, and each such party shall sign the bond with his usual signature, or the bond may be executed in his name by a duly empowered attorney-in-fact.

3. In the case of a copartnership, the trade name of the firm, followed by the names of all the members thereof, shall be given in the heading. In executing the bond the firm name shall be typed or written, followed by the word "By" and the usual signature of all partners, or the signature of any partner duly authorized to sign the bond in behalf of the firm, or by a duly empowered attorney-in-fact.

4. If the principal is a corporation, the heading shall give the corporate name, the name of the state under the laws of which it is organized, and the location of the principal office, and the bond shall be executed in the corporate name, immediately followed by the usual signature and the title of the person duly authorized to act in its behalf, and the bond shall be attested under the corporate seal. If the corporation has no corporate seal that fact should be stated.

5. The official character and authority of the person or persons executing the bond for the principal, if a corporation, shall be certified by the secretary or assistant secretary and there must be attached to the bond copies of so much of the records of the corporation as will show the official character

and authority of the officer, or attorney-in-fact, signing, duly certified by the secretary or assistant secretary, under the corporate seal, if any, to be true copies.

6. Each signature must be made in the presence of two witnesses, (except where corporate seals are attached) who must sign their names as such.

7. Bonds may be given with corporate surety authorized to act as surety by the Secretary of the Treasury, or individual sureties (of which there must be two) or by the deposit of proper collateral.

8. The sufficiency of individual sureties should be shown by affidavits made on Form 33.

9. A married woman may not be accepted as surety. If an unmarried woman acts as surety, she must include in her affidavit a statement setting forth the fact that she is unmarried.

10. The surety or sureties on the bond must have no interest whatever in the business.

11. All erasures or interlineations must be made before the bond is signed and a statement to that effect attached to the bond.

12. The penal sum named in the bond must not be less than the amount of the tax on the spirits that can be distilled during a period of 15 days by the use of the entire spirit-producing capacity of the distillery, and should be increased from time to time if each increase be made necessary by the in-

crease of such capacity, but in no case shall the bond exceed the sum of $100,000.

13. The location of the distillery must be stated with certainty and accuracy; if in a city, village, or town, the blank should be filled as printed, if in the country, it should be described as near the nearest city, village, town, or post office.

EXHIBIT No. 5

14 BP ONS — 14th District
FD #306 — Form 14-133

Registered Mail—Return Receipt Requested

May 25, 1939

To: Livermore Winery, Incorporated, Third and Church Streets, Livermore, California, Principal, and Saint Paul Mercury-Indemnity Company, 60 Sansome Street, San Francisco, California, Surety.

(Attention: Mr. A. W. McIntyre.)

Demand Is Hereby Made upon you, and each of you, that you shall pay to the Collector of Internal Revenue of the United States Treasury Department, for the 1st District of California, the sum of ($3,239.00) Three Thousand Two Hundred Thirty-Nine and no/100 Dollars in order to discharge the following described assessment for taxes upon alcoholic liquors, said assessment appearing upon the assessment rolls of said district as hereinafter described.

Tax assessed on 1619.56 proof gallons of brandy lost through negligence on Fruit Distillery Premises No. 306 on Dec. 26, 1936, @ $2.00 per proof gallon, which appears on Collector's March 1937 List, Page 504/2 $3,239.00

together with penalties as prescribed by law and together with interest thereon until paid as provided by law.

The Collector of Internal Revenue for the 1st District of California has served notices and demands for payment of the above taxes, penalties and interest upon the principal addressee above mentioned, to wit: Livermore Winery, Incorporated, but to date the said obligation remains due, unpaid, delinquent and owing to the United States of America.

Accordingly, notice is hereby given and demand hereby made upon the above principal and surety that said obligation shall be forthwith paid and discharged and that I have in my possession that certain bond on Form 30½ dated Nov. 6, 1936, effective on the 26th day of June, 1936, wherein the above described principal is named as principal and the above described surety, to wit: Saint Paul Mercury-Indemnity Company is the surety, by the terms of which said bond the said surety obligates itself to discharge the obligations of the principal of a kind and character hereinabove described in default of the discharge of said obligations by the said principal.

Therefore, if within thirty (30) days from the receipt by the said above described surety of the notice and demand for the discharge of the aforementioned obligation the said obligation is not discharged by said principal and/or said surety, then in such event it will be the duty of the undersigned to carry out such conferences with the said Collector of Internal Revenue and the United States Attorney for the appropriate judicial district toward the end that suit may be filed upon the aforedescribed bond for the purpose of effecting the collection and discharge of the said foregoing liability.

J. H. MALONEY,
District Supervisor

DEH:cwt (lk) ons

[Endorsed]: Filed April 17, 1943. [13]

[Title of District Court and Cause.]

AMENDED ANSWER TO COMPLAINT

Comes now Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation, sued herein as The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California corporation, defendants above named, and file herein, as provided by law, and pursuant to authority therefor, their amended answer to the complaint on file herein, and in answer to the causes

of action and the allegations therein set forth, each for itself, admits, denies and alleges, as follows:

I.

Defendant, Livermore Winery, Incorporated, admits the [14] allegations contained in paragraphs II and X of the first cause of action and the allegations of said paragraphs as realleged in paragraph II of the second cause of action;

II.

Defendants are without sufficient information, knowledge or belief, in order to form a belief, as to the truth of the allegations contained in paragraphs I, V, VIII, and IX of the first cause of action, and said paragraphs as realleged in paragraph II of the second cause of action, and paragraphs I and V of the second cause of action, and on the ground of such lack of knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, deny each and every, all and singular, the allegations contained in said paragraphs;

III.

Answering paragraphs VI and VII of the first cause of action of said complaint, and said paragraphs as realleged in paragraph II of the second cause of action, and paragraph VII of the second cause of action, defendants deny each and every, all and singular, the allegations therein contained;

IV.

Answering paragraph VI of the second cause of

action, defendant, Livermore Winery, Incorporated, is without sufficient knowledge or information sufficient to form a belief as to the truth of the allegations therein contained, and on such grounds denies each and every, all and singular, the allegations contained in said paragraph, except that defendant, Livermore Winery, Incorporated, admits the allegations contained in paragraph VI insofar as said defendant itself is concerned;

V.

Defendant, Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation, on the ground that it is without knowledge or information sufficient to form a belief as to the truth of the [15] allegations contained in paragraph X of the first cause of action, and as realleged in paragraph II of the second cause of action, also that portion of paragraph VI of the second cause of action, insofar as it relates to defendant Livermore Winery, Incorporated, denies each and every, all and singular, the allegations therein contained;

VI.

Defendants admit the allegations contained in paragraphs III and IV of the first cause of action, and as realleged in paragraph II of the second cause of action; also, the allegations of paragraphs III and IV of the second cause of action;

VII.

Defendant, Saint Paul-Mercury Indemnity Company of Saint Paul admits the allegations con-

tained in paragraph III of the second cause of action and that portion of paragraph VI of the second cause of action relating to said defendant;

VIII

Answering paragraph XI of the first cause of action, defendant Livermore Winery, Incorporated, denies each and every, all and singular, the allegations therein contained, and defendant Saint Paul-Mercury Indemnity Company of Saint Paul, on the ground that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph XI of the first cause of action, denies each and every, all and singular, the allegations therein contained;

And by Way of Affirmative Defenses to the Causes of Action Set Forth in Said Complaint, Defendants Allege:

I.

Refer to and incorporate herein for all purposes, as if set forth herein in full, paragraphs III and IV of the first cause of action set forth in the complaint filed herein; [16]

II.

That defendant, Livermore Winery, Incorporated, has paid all taxes legally levied and assessed upon and against said defendant in connection with any and all brandy and distilled spirits distilled at Fruit Distillery No. 306, aforesaid, and re-

moved therefrom thereafter by or with the consent or knowledge of said defendant;

III.

Defendants allege that the said 1619.56 proof gallons (tax gallons) of distilled spirits, to wit, brandy, referred to in paragraphs V, VI and VII of the first cause of action and as realleged in paragraph II of the second cause of action of said complaint, have never been removed from Fruit Distillery No. 306, the place where, according to paragraph V of said complaint, said distilled spirits were allegedly distilled by said defendants, and that accordingly the tax imposed, levied and assessed against defendant Livermore Winery, Incorporated, has not become and is not now due or payable to plaintiff under the statutes set forth in said complaint, or otherwise;

IV.

That defendants are not indebted to plaintiff in the amounts or for the sums set forth in the first and second causes of action of said complaint, or any sum or sums whatever, in connection therewith;

V.

That on or about the 26th day of December, 1936, a quantity of distilled spirits, to wit, brandy, the amount, proof, or gallonage thereof being unknown to defendant, was distilled in Fruit Distillery No. 306 operated by defendant, Livermore Winery, Incorporated. That said distilled spirits were, on said date, deposited in Receiving Tank

No. 2 in said Fruit Distillery No. 306. That without the knowledge or consent of defendant, a person unknown, [17] caused a hose to be connected to and with the Livermore City Water system, and then to be joined and connected to an unsealed faucet, the existence of which was unknown to defendant and which unsealed faucet had been installed without the knowledge or consent of defendant, in and on the distilling material line connected with the still on said premises; That thereafter a faucet was turned on by persons unknown to defendant, and without the knowledge of defendant, so that said water from the Livermore City water system was caused to flow through said hose into the distilling material line, and then into a still located in Fruit Distillery No. 306, and which still was connected with Receiving Tank No. 2; That thereafter the still filled with water so as to cause the water therein to overflow through the vapor line, condensor and trybox and into Receiving Tank No. 2, in which an unknown quantity of distilled spirits or brandy had previously been placed; That said water flowing into Receiving Tank No. 2, as aforesaid, caused said tank to become completely filled with water and brandy so as to cause the same to and it did overflow upon and in the premises known as Fruit Distillery No. 306, and not elsewhere;

That at no time prior to the overflowing of Receiving Tank No. 2, as aforesaid, had said distilled spirits therein been gauged as to quantity, proof, or gallonage;

That thereafter, an employee of plaintiff gauged

and tested the brandy and water remaining in Receiving Tank No. 2 and concluded therefrom and on a hearsay statement submitted to said employee by a person or persons unknown, that approximately the sum of 1619.56 proof gallons of brandy previously distilled had been lost by reason of the overflowing of Receiving Tank No. 2 occasioned by the running of water therein;

That in the belief that said sum of 1619.56 proof gallons represented a determined and fixed, rather than an estimated, loss [18] occasioned by the overflowing of the water and brandy out of and from Receiving Tank No. 2, defendant, Livermore Winery, Incorporated, erroneously reported the production of the aforesaid sum of 1619.56 proof gallons of brandy and the resulting loss thereof, when in fact there has never been ascertained and determined to date the actual quantity, or proof gallons, of distilled spirits, to wit, brandy, actually produced on December 26, 1936, or the alleged loss thereafter on said date and on December 27, 1936;

That defendant cannot ascertain and does not know how much, if any, proof gallons of brandy were produced and lost by reason of the overflowing of Receiving Tank No. 2, as aforesaid;

That thereafter an unknown quantity of the distilled spirits contained in the water that had overflowed from Receiving Tank No. 2 was recaptured in Fruit Distillery No. 306 and was thereafter redistilled and all taxes due and payable thereon

were paid in the form and manner provided by law following the removal of said brandy from Fruit Distillery No. 306;

VI.

That the loss of the distilled spirits, to wit, brandy, was occasioned by and is a casualty, and was due to a casualty that occurred without any fraud, collusion or negligence of the owner thereof, namely, defendant Livermore Winery, Incorporated;

That defendant, Livermore Winery, Incorporated, was the owner of the distilled spirits lost, as aforesaid, and is entitled to have any tax levied, assessed, due or otherwise payable thereon, abated under the Internal Revenue Laws of the United States then in full force and effect and particularly Section 3221 of the revised statutes of the United States as set forth and contained in Section 2901 of the Internal Revenue Code, 1939, United States Code Annotated, title 26, Section 2901, (b) and (c) thereof which read as follows:

(b) "The Secretary, upon the production to him of [19] satisfactory proof of the actual destruction by accidental fire or other casualty, and without any fraud, collusion or negligence of the owner thereof, of any distilled spirits, while the same remained in the custody of any officer of internal revenue of any internal revenue bonded warehouse or of any grape brandy withdrawn for use in the fortification of sweet wines and destroyed prior to such use, while stored in the fortifying room on

the winery premises, and before the tax thereon has been paid, may abate the amount of internal revenue taxes accruing thereon, and may cancel any warehouse bond, or enter satisfaction thereon, in whole or in part, as the case may be. And if such taxes have been collected since the destruction of said spirits or grape brandy, the said Secretary shall refund the same to the owners thereof out of any moneys in the Treasury not otherwise appropriated. And when any distilled spirits are destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence of the owner thereof, after the time when the same should have been drawn off by the storekeeper-gauger and placed in the internal revenue bonded warehouse provided by law, no tax shall be collected on such spirits so destroyed, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified. When the owners of distilled spirits or grape brandy in the cases provided for by this section may be indemnified against such tax by a valid claim of insurance, for a sum greater than the actual value of the distilled spirits or grape brandy before and without the tax being paid, the tax shall not be remitted to the extent of such insurance.

(c) If distilled spirits upon which the internal revenue tax has not been paid are lost by theft, accidental fire, or other casualty while in possession of a common carrier subject to the Transportation Act of 1920, February 28, 1920, c. 91, 41 Stat. 474 (U.S.C. Title 49, c. 1.), or the

Merchant Marine Act, 1920, June 5, 1920, c. 230, 41 Stat. 988 (U.S.C. Title 46, c. 24), or if lost by theft from an internal revenue bonded warehouse, and it shall be made to appear to the Commissioner that such losses did not occur as the result of negligence, connivance, collusion, or fraud on the part of the owner or person legally accountable for such distilled spirits, no tax shall be assessed or collected upon the distilled spirits so lost, nor shall any tax penalty be imposed or collected by reason of such loss, but the exemption from the tax and penalty shall only be allowed to the extent that the claimant is not indemnified against or recompensed for such loss. This provision shall apply to any claim for taxes or tax penalties that may have accrued since October 28, 1919, or that may accrue hereafter. Nothing in this section shall be construed as in any manner limiting or restricting the provisions of Part II of Subchapter C."

also under the provisions of Section 3031, subdivision (b) of the internal revenue code, which reads as follows: [20]

(b) "The Commissioner, under the rules and regulations to be by him prescribed with the approval of the Secretary, upon the presentation of proof to his satisfaction of the loss by leakage, evaporation, theft, or otherwise, of brandy or fruit spirits, intended for the fortification of wine, from storage tanks in bonded warehouses or from steel drums filled therefrom while such drums are in such warehouse, and in the fortification room of a

bonded winery, not occurring as a result of any negligence, connivance, collusion, or fraud on the part of the winemaker or his agents, is hereby authorized to remit or refund the taxes assessed or paid upon such lost brandy or fruit spirits; Provided, However: That such remission or refund shall be allowed only to the extent that the distiller or winemaker is not indemnied or recompensed for such loss.''

VII.

That to the extent of any loss suffered by defendants, neither of said defendants, nor both of them, have been indemnified or recompensed for such loss to date from any persons whomsoever;

VIII.

That as there is no tax due, payable, unpaid to plaintiff arising out of the allegations contained in the first cause of action of said complaint, or as realleged in the second cause of action of said complaint; nor has said tax, or any tax alleged to be due, been lawfully assessed against defendants; hence defendants allege that there is no sum due, payable, and unpaid from defendants to plaintiff under the written instrument set forth in paragraph IV of the second cause of action of said complaint, or at all;

Wherefore, defendants pray that plaintiff take nothing by or under its said complaint and that defendants be dismissed with their costs of suit herein incurred, that any and all liens recorded,

filed, or otherwise placed against any property belonging to defendants be released and discharged forthwith. and for such other relief as this honorable Court shall deem just and proper in the premises.

Dated: December 16, 1944.

ROBERT H. FOUKE,
Attorney for Defendants.

Authority is hereby granted to defendants to file the within Amended Answer to Complaint forthwith.

Dated: December 18, 1944.

ALBERT S. GUERARD,
Asst. U. S. Attorney, Attorney for Plaintiff.

MICHAEL J. ROCHE,
Judge of the District Court.

[Endorsed]: Filed Dec. 18, 1944. [21]

[Title of District Court and Cause.]

ORDER FOR ENTRY OF JUDGMENT

It Is Ordered that there be entered herein judgment in favor of the plaintiff and against the defendants Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, jointly and severally, in the sum of $3,239.00 together with a penalty of 5 per cent thereon in

the amount of $161.92, and interest on said $3,239.00 at the rate of 6 per cent per annum from May 4, 1937, to date of payment, upon findings of fact and conclusions of law. The respective parties will pay their own costs.

Dated: February 27, 1945.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Feb. 27, 1945. [22]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above case came regularly on for trial to the Court without a jury on December 19, 1944, and from the admissions made and the oral testimony of witnesses adduced at the trial the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This suit is brought by the United States of America upon authorization by the Commissioner of Internal Revenue at the direction of the Attorney General of the United States on a Fruit-Distiller's Bond for the recovery of distilled spirits taxes alleged to have been incurred by the defendant, Livermore Winery, Incorporated.

2. Livermore Winery, Incorporated, in 1936, was and now is a California corporation, and was

engaged in the business of a fruit distiller at Third and Church Streets, Livermore, California, in November and December, 1936, and the Saint Paul Mercury-Indemnity Company of Saint Paul, Minnesota, is a corporation duly authorized to do business in California.

3. The defendants, Livermore Winery, Incorporated, as principal, and Saint Paul Mercury-Indemnity Corporation of Saint Paul, as surety, on November 6, 1936, executed to the United States of America a Fruit-Distiller's Bond, in the sum of $43,500, for Registered Distillery No. 306, located at the Northeast corner of Third and Church Streets, Livermore, California. The bond became effective June 26, 1936, and continued to April 30, 1937; and was continued:

* * * *

that if the principal——

1. Shall, in all respects, faithfully comply with all the provisions of law and regulations made in pursuance thereof [24] relating to the duties and business of distillery of brandy; and

2. Shall pay all penalties incurred or fines imposed on him for a violation of any of the said provisions; and

3. Shall not suffer the lot or tract of land on which the distillery stands, or any part thereof, or any of the distilling apparatus, to be encumbered by mortgage, judgment, or other

lien, during the time in which he shall carry on said business; and

4. Shall pay or cause to be paid all taxes at the rate imposed by law now or hereafter in force (plus penalties, if any, and interest) on brandy produced by him;

Then this obligation is to be null and void, but otherwise to remain in full force, virtue, and effect.

4. From December 1, 1936, to December 26, 1936, inclusive, the Livermore Winery, Incorporated, manufactured 4,578.65 proof gallons of distilled brandy of which 1,677.02 proof gallons were removed on December 4, 1936, leaving on hand 2,901.63 proof gallons of distilled brandy on December 26, 1936.

5. The distilled brandy was in Receiving Tank No. 2 which, according to the tank gauge, contained 1,854 wine gallons at the close of business on December 26, 1936. The distiller's log showed the proof of the distilled brandy in Receiving Tank No. 2 to be 155. According to these records of measurement there were on hand at the close of business December 26, 1936, a total of 2,873.70 proof gallons of distilled brandy.

6. Some time between the evening of December 26, 1936, and the morning of December 27, 1936, a person then employed as distiller by Livermore Winery, Incorporated, attached a water hose to the distilling material line and turned the water

into the still to wash it, but failed to open the stop-line valve. As the still filled with water, there being no opening for egress, the water backed into the still column and into Receiving Tank No. 2.

7. On the morning of December 27, 1936, Receiving Tank No. 2 was overflowing with a mixture of brandy and water, and upon discovery an employee of Livermore Winery, Incorporated, shut off the water running into the still.

8. On December 27, 1936, Receiving Tank No. 2 contained 2,159.1 wine gallons of the water and brandy mixture which had an alcoholic content of 51 proof, making a total of 1,101.4 proof gallons of brandy in the said tank. There were recovered from the distilling material sump 765 wine gallons of [25] water and brandy mixture which had an alcoholic content of 20 proof or a total of 153 proof gallons of brandy, which sum added to the brandy in the tank makes a grand total of 1,254.14 proof gallons of diluted brandy on hand December 27, 1936.

9. Accepting as on hand December 26, 1936, the amount of 2,873.7 proof gallons of brandy as found in paragraph 5 hereof, which is the amount most favorable to the defendants, and deducting therefrom the 1,254.14 proof gallons of brandy on hand December 27, 1936, I find that 1,619.56 proof gallons of brandy were lost through the overflow.

10. On April 23, 1937, the Commissioner of Internal Revenue certified an assessment to the Col-

lector of Internal Revenue, First District of California, in the sum of $3,239.00 for taxes on 1,619.56 proof gallons of brandy lost through negligence December 26 and 27, 1936, which said assessment was entered on the books of the Collector of Internal Revenue on the March, 1937, Distilled Spirits List, page 504.

11. On May 4 and May 15, 1937, the Collector of Internal Revenue served notice and demand for payment of the tax upon the Livermore Winery, Incorporated.

12. No part of the distilled spirits taxes have been paid on the 1,619.56 proof gallons of brandy lost as hereinbefore found.

CONCLUSIONS OF LAW

1. The tax on distilled spirits in December, 1936, as by law provided was $2 per proof gallon. The tax attached to the distilled spirits as soon as they came into existence and became payable by the distiller upon their removal from the place where they were distilled if not deposited in a bonded warehouse.

2. The loss of the 1,619.56 proof gallons of distilled brandy was caused through the negligence of Livermore Winery, Incorporated, within the meaning of the statutes and not by casualty.

3. The 1,619.56 proof gallons of distilled brandy were removed from the place where distilled and not deposited in a bonded warehouse. The tax of

$2 per proof gallon on the 1,619.56 proof gallons of brandy became due and payable on December 27, 1936. [26]

4. The assessment made by the Commissioner of Internal Revenue on 1,619.56 proof gallons of brandy lost through negligence December 26 and 27, 1936, was lawfully and correctly made.

5. The defendants, Livermore Winery, Incorporated, and Saint Paul Mercury-Indemnity Company of Saint Paul, are jointly and severally indebted to the plaintiff for the sum of $3,239, together with a penalty of 5 per cent thereon in the amount of $161.95, and interest on the said $3,239 at the rate of 6 per cent per annum from May 4, 1937, to date hereof in the sum of $1,530.43.

6. Judgment in the sum of $4,931.38 shall be entered for the plaintiff against the defendants jointly and severally; directing, however, the respective parties to pay their own costs.

MICHAEL J. ROCHE,

United States District Judge.

Dated March 28th, 1945.

[Endorsed]: Lodged March 21, 1945. Filed March 28, 1945. [27]

In the District Court of the United States for the Northern District of California, Southern Division

No. 22591—R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, a Delaware corporation, of Saint Paul, Minnesota, and LIVERMORE WINERY INCORPORATED, a California corporation,

Defendants.

JUDGMENT FOR PLAINTIFF

The above case came regularly on for trial on December 19, 1944, Frank J. Hennessy, United States Attorney for the Northern District of California, directing Albert S. Guerard, Assistant United States Attorney, appearing for the plaintiff, and Robert H. Fouke appearing for the defendants. The case was tried to the Court without a jury, and the Court having entered its findings of fact and conclusions of law it is, therefore, hereby

Ordered, adjudged and decreed that the plaintiff have and recover of and from the defendants jointly and severally the sum of $4,931.38.

It is further ordered and directed that the respective parties shall pay their own costs.

MICHAEL J. ROCHE,
United States District Judge.

Dated March 28th, 1945.

[Endorsed]: Lodged March 21, 1945. Filed March 28, 1945. [28]

[Title of District Court and Cause.]

NOTICE OF MOTION TO SET ASIDE JUDGMENT

To: The Plaintiff Above Named, and to Frank J. Hennessy, United States Attorney, and Albert S. Guerard, Asst. United States Attorney, Attorneys for Plaintiff:

You and each of you will please take notice that on Monday, the 25th day of June, 1945, at the hour of 10:00 O'clock A.M. of said day, or as soon thereafter as counsel may be heard, at the courtroom of the above entitled court, at the Post Office Building, 7th and Mission Streets, San Francisco, California, the above named defendants will move this court for its order setting aside and vacating the judgment entered herein on the 28th day of March, 1945, in favor of plaintiff and against defendants. Said motion will be based on the following grounds:

That plaintiff, as the prevailing party, failed

and neglected to serve a copy of its proposed findings of fact and conclusions [29] of law upon defendants or upon defendants' attorneys as required by Rule 5, Subdivision E of the Rules of Practice of the District Court of the United States, Northern District of California.

That by reason of such failure, defendants were deprived of their opportunity to file proposed amendments to said findings.

Said motion is further based upon the affidavit of defendants' attorney, attached hereto, and upon the records and files in the above entitled action.

ROBERT H. FOUKE,
HANS A. KRUGER,
Attorneys for Defendants.

(Acknowledgement of Receipt of Copy)

[Endorsed]: Filed June 21, 1945. [30]

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT H. FOUKE

State of California,
City and County of San Francisco—ss.

Robert H. Fouke, being first duly sworn, deposes and says: That he is now, and has been since the inception of the above entitled action, the attorney of record for defendants, The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, and Livermore Winery, Incorporated, a California Corporation;

That he has never received any proposed findings of fact and conclusions of law from plaintiff, or its attorneys herein, prior to the Notice of Judgment dated April 4, 1945, at which time, findings of fact and conclusions of law had been signed and judgment entered; that proposed findings of fact and conclusions [31] of law have not, at any time prior to said April 4, 1945, been served upon him by leaving a copy of said proposed findings of fact and conclusions of law at his office, and further states upon information and belief that said proposed findings of fact and conclusions of law were never mailed to him;

Wherefore, your affiant requests that the judgment entered in the above entitled proceedings, based on the findings of fact and conclusions of law on file herein, be set aside and vacated; that said findings of fact and conclusions of law be vacated; that he be given the opportunity to file amendments to said findings of fact and conclusions of law as proposed by plaintiff herein.

ROBERT H. FOUKE.

Subscribed and sworn to before me this 21st day of June, 1945.

[Seal] LOUIS WIENER,
Notary Public in and for the City and County of San Francisco, State of California.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed June 21, 1945. [32]

[Title of District Court and Cause.]

MOTION TO DENY DEFENDANTS' MOTION TO SET ASIDE JUDGMENT

Plaintiff moves the Court to deny the motion of the defendants for its order to set aside and vacate the judgment entered herein on the 28th day of March, 1945, in favor of the plaintiff and against the defendants, and bases its motion upon the Affidavit of Albert S. Guerard, Assistant United States Attorney, filed herewith, and upon the records and files in the action.

Dated: June 23, 1945.

FRANK J. HENNESSY,
United States Attorney, Attorney for Plaintiff.

By W. E. LICKING,
Asst. U. S. Atty. [33]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DENY DEFENDANTS' MOTION TO SET ASIDE JUDGMENT

"§ 19201. In General

"Rule 5(b) supplements Rule 5(a). The first paragraph of the rule provides what papers must be served and upon whom they must be served while paragraph (b) prescribes the manner in which that service shall be made. It reads: 'Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney un-

less service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.' " (Underscoring ours.)

"§19205.—What Constitutes

"Service may be made in any one of three ways. The rule provides: 'Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with the clerk of the court.'

"The reason for permitting service to be made by mailing or by leaving with the clerk is that the court has already secured jurisdiction over the party through personal or substituted service of the summons and complaint as provided in Rule 4. It is, therefore, valid service even though the paper mailed never actually reaches the party, since

'service is complete upon mailing.' Although the rule does not state that service is complete upon leaving a copy with the clerk, this would follow the same as a service by mailing.''

Hughes Federal Practice, Jurisdiction and Procedure, Volume 17, Sections 19201 and 19205; Pages 227, 228, and 229.

[Endorsed]: Filed June 23, 1945. [34]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO DEFENDANTS' MOTION TO SET ASIDE JUDGMENT

Albert S. Guerard, being duly sworn, deposes and says:

That he is Assistant United States Attorney, and assigned by Frank J. Hennessy, United States Attorney, to prepare, try, and perform all necessary legal duties in connection with the above entitled action.

That on February 27, 1945, this Court ordered that there be entered herein judgment in favor of the plaintiff and against the defendants, jointly and severally, in the sum of $3,239.00, together with a penalty of 5% thereon in the amount of $161.92, and interest on said $3,239.00 at the rate of 6% per annum from May 4, 1937, to [35] date of payment, upon findings of fact and conclusions of law; that the records of the Clerk of this Court

show that a copy of the above order was mailed to defendants' attorney on February 27, 1945.

That on March 20, 1945, this affiant personally mailed to Robert H. Fouke, attorney of record for the defendants, duplicate copies of the findings of fact and conclusions of law with copies of proposed judgment, asking that he acknowledge service on one of the copies; that no acknowledgement of said findings of fact and conclusions of law and the proposed judgment was made by Robert H. Fouke, attorney of record for defendants.

That on the 28th day of March, 1945, judgment for the plaintiff was entered of record in the office of the Clerk of the above entitled Court, and the records of said Clerk show that notice of said judgment was mailed to the attorney of record for the defendants; that on April 4, 1945, an original and copy of notice of judgment were mailed to said Robert H. Fouke, attorney of record for the defendants, with request that he accept service and return the original; that a few days thereafter said Robert H. Fouke telephoned to this affiant, and stated that he had received the notice of judgment, but would not accept service thereof because he had never received the proposed findings of fact and conclusions of law and had thus been deprived of his right to file proposed amendments or additions, and urged this affiant to stipulate that judgment be suspended and he be given time to submit his proposed amendments or additions; that he was leaving in a day or two for Los Angeles, California,

and would be gone for a week or ten days, and would then again communicate with this affiant; that this affiant informed said Robert H. Fouke, attorney of record as aforesaid, that the affiant could enter into such a stipulation only upon authority of the Attorney General of the United States; that on April 11, 1945, the claim of Mr. Fouke that he did not receive findings of fact and conclusions of law which were mailed [36] to him on March 20, 1945, together with his demand for a stipulation suspending judgment until he could submit proposed amendments or additions, were communicated to the Attorney General of the United States; that on April 13, 1945, the Attorney General of the United States instructed affiant, through Frank J. Hennessy, United States Attorney, to refuse to sign the stipulation requested; that thereafter, on or about April 17, 1945, the instructions of the Attorney General were communicated by telephone to Mr. Fouke, attorney of record for defendants as aforesaid, by this affiant; that no further action was taken by the defendants until the filing of the present motion on June 21, 1945.

ALBERT S. GUERARD.

Subscribed and sworn to before me this 23rd day of June, 1945.

[Seal] L. C. JACOBSEN,

Deputy Clerk, U. S. District Court, Nor. Dist. of California.

[Endorsed]: Filed June 23, 1945. [37]

District Court of the United States, Northern District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 25th day of June, in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Michael J. Roche, District Judge.

[Title of Cause.]

ORDER DENYING MOTION TO SET ASIDE JUDGMENT

This case came on regularly this day for hearing of motion to set aside judgment. After hearing the arguments of Robert Fouke, Esq., for plaintiff, and Albert Guerard, Esq., Assistant United States Attorney, it is Ordered that said motion to set aside judgment be and the same is hereby denied. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California corporation, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth

Circuit from the final judgment entered in this action on March 28, 1945.

Dated: June 27th, 1945.

ROBERT H. FOUKE,
HANS A. KRUGER,
Attorneys for Defendants and Appellants.

[Endorsed]: Filed June 27, 1945. [39]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents:

That we, The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California Corporation, as Principals, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland and authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto United States of America, in the full and just sum of Two Hundred Fifty and no/100ths ($250.00) Dollars, to be paid to the said United States of America; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. [40]

Sealed with our seals and dated this 27th day of June, 1945.

Whereas, lately at the District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said court, between United States of America against The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California Corporation, No. 22591-R, judgments were rendered against The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California corporation, and the said defendants above named have filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the State of California.

Now, therefore, the condition of the above obligation is such, that if the said The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation, of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California Corporation, shall prosecute their appeal and answer all costs if they fail to make their pleas good, then the above obligation to be void; also to remain in full force and virtue.

And Further, it is expressly understood and agreed that in case of a breach of any condition of the above obligation, the Court in the above entitled matter may, upon notice to the Fidelity and De-

posit Company of Maryland, of not less than ten (10) days, proceed summarily in the action or suit in which the same was given to ascertain the amount which said Surety is bound to pay on account of such breach, and render judgment therefor against it and award execution therefor.

Acknowledged before me the day and year first above written. [41]

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL.

By H. C. DITTMAN.

Assistant Manager.

LIVERMORE WINERY, INCORPORATED,

By G. C. CROCE.

The premium charged for this bond is ten Dollars ($10.00) per annum.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

By ROBERT WHYTE,

Attorney in Fact.

Attest G. KAHLENBECK,

Attesting agent.

(Seal of Fidelity and Deposit Company of Maryland.)

Examined and recommended for approval.

ROBERT H. FOUKE,

HANS A. KRUGER.

(Justification of Surety.)

[Endorsed]: Filed June 27, 1945. [42]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Pursuant to Rule 75 of the Rules of Civil Procedure for the District Courts of the United States, the Appellants designate that there be included in the record on appeal the following documents, records and exhibits, and all other matters required under the rules of this court or of the Circuit Court of Appeals of the Ninth Circuit to be so included.

(1) Complaint to enforce collection of Internal Revenue Taxes upon distilled Spirits and to enforce collection thereof upon Bond given to guarantee payment of same and exhibits attached thereto.

(2) Amended Answer to complaint

(3) Order for entry of Judgment

(4) Findings of Fact and Conclusions of Law

(5) Judgment for plaintiff

(6) Notice of Motion to set aside judgment [43]

(7) Affidavit of Robert H. Fouke in support of the Motion to set aside judgment

(8) Affidavit in Opposition to Defendant's Motion to set aside judgment

(9) Minute Order denying motion to set aside judgment

(10) Notice of Appeal

(11) Designation of Record on Appeal

(12) Stipulation and Order re: exhibits on appeal

(13) Cost Bond on Appeal

(14) Certified Reporter Transcript of all proceedings in the above entitled action

ROBERT H. FOUKE,

HANS A. KRUGER,

Attorneys for Defendants and Appellants.

Receipt of a copy of the within Designation of Record on Appeal is hereby admitted this 20th day of July, 1945.

FRANK J. HENNESSY,

Attorney for Plaintiff.

Pet T. S.

[Endorsed]: Filed July 20, 1945. [44]

[Title of District Court and Cause.]

STIPULATION AND ORDER RE: EXHIBITS ON APPEAL

It is hereby stipulated by and between counsel for the above entitled parties that the Clerk of this Court as provided by law and in conformity with Rule 75 of the Rules of Civil Procedure, shall

transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the hereinafter enumerated original exhibits introduced at the trial of the above entitled cause, said exhibits not constituting a part of the printed record on appeal, and that exhibits may be incorporated in and made a part of the record on appeal by reference only, said exhibits being as follows:

Exhibit No.

1. Monthly Return of Fruit Distiller—Form 15

1-A. Letter dated January 19, 1937, to Livermore Winery Re Form 15 [45]

1-B. Monthly Return of Fruit Distillers Form 15

2. Fruit Distillers Bond—Form 30½

3. Demand for payment of Tax—Form 14-133

4. Letter from Livermore Winery to District Supervisor Internal Revenue Service, Alcohol Tax Unit, San Francisco, California, dated December 30, 1936.

5. Copy Assessment Certificate—Form 23-C

6. Original Assessment Certificate—Form 23C

7. Notice and demand for Tax, Second Motion and demand for Tax—Form 21

It is further stipulated that said exhibits shall be held by the Clerk of the Appellate Court pending the Appeal and thereafter returned to the Clerk of this Court.

Dated July 20th, 1945.

ROBERT H. FOUKE,
HANS A. KRUGER,
Attorneys for Defendants and Appellants.

FRANK J. HENNESSY,
United States Attorney.

By R. B. McMILLAN,
Assistant United States Attorney.

It is so Ordered:

A. F. ST. SURE,
Judeg of the United States District Court.

[Endorsed]: Filed July 20, 1945. [46]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellant herein may have to and including September 15, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: August 6, 1945.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Aug. 6, 1945. [47]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefor, it is hereby Ordered that the Appellants herein may have to and including September 25, 1945, to file the Record on Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated: September 15, 1945.

MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed Sept. 15, 1945. [48]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY

On this appeal, Appellants intend to rely upon the following points:

The District Court erred:

(1) In that the facts found by the Trial Court do not support its conclusions of law;

(2) In ordering judgment to be entered in favor of the plaintiff and against the defendants;

(3) In impliedly finding that there was removed on December 26th and December 27th, 1936, from the distillery premises of defendant Livermore Winery, Incorporated, a California corporation, at Livermore, California, 1619.56 proof gallons of brandy. There is no evidence to [49] support such finding.

(4) In finding that 1,677.02 proof gallons were removed on December 4, 1936, leaving on hand 2,901.63 proof gallons of distilled brandy on said Livermore Winery premises on December 26, 1936. There is no evidence to support such finding.

(5) In impliedly finding that the "person" referred to in Finding number 6 was an employee of the Livermore Winery, Incorporated, and had attached a water hose to the distilling material line and turned the water into the still to wash it, but failed to open the stop-line valve. There is no evidence to support such finding.

(6) In impliedly finding that on the morning of December 27, 1936, Receiving Tank No. 2 was overflowing with a mixture of water and brandy. There is no evidence to support such finding.

(7) In impliedly finding that on December 27, 1936, Receiving Tank No. 2 contained 2,159.1 wine gallons of the water and brandy mixture with an alcoholic content of 51 proof, making a total of 1,010.4 proof gallons of brandy, of which 765 wine gallons were recovered from the distilling material sump, having an alcoholic content of 20 proof, or a total of 153 proof gallons of brandy, and that the total of said water and brandy mixture made a grand total of 1,254.14 proof gallons of diluted brandy on hand on December 27, 1936. There is on evidence to support such finding.

(8) In impliedly finding that 1,619.56 proof gallons of brandy were lost through negligence December 26th and 27th, 1936. There is no evidence to support such finding.

(9) In impliedly finding that on May 4th and May 15th, 1937, the Collector of Internal Revenue served notice and demand for payment of the tax upon the Livermore Winery, Incorporated. [50]

(10) In impliedly concluding that there had been a removal of 1619.56 proof gallons of distilled brandy from the distillery premises and that a tax of $2.00 per proof gallon on the 1619.56 proof gallons of brandy, in the sum of $3,239.00, became due and payable on December 27, 1936. Such conclusion is supported by neither the findings, the evidence nor the law.

(11) In impliedly concluding that the loss of the 1619.56 proof gallons of distilled brandy was caused through the negligence of Livermore Winery, Incorporated, and not by casualty. Such conclusion is supported by neither the findings, the evidence nor the law.

(12) In impliedly concluding that the assessment made by the Commissioner of Internal Revenue on 1619.56 proof gallons of brandy assertedly lost through negligence December 26th and 27th, 1936, was lawfully and correctly made. Such conclusion is supported by neither the findings, the evidence nor the law, and is contrary to the evidence.

(13) In impliedly concluding that defendants are jointly and severally indebted to plaintiff in the sum of $3,239.00, together with a penalty of 5% thereon in the amount of $161.95, and interest on the said $3,239.00 at the rate of 6% per an-

num from May 4, 1937, to date hereof in the sum of $1,530.43. Such conclusion is supported by neither the findings, the evidence nor the law.

(14) In its rulings as to the admissibility of certain evidence to which objections were properly made or to which motions to strike were properly made and denied, particularly:

(a) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 5, purporting to be a certified copy of Assessment Certificate, and plaintiff's [51] Exhibit No. 6, purporting to be an original Certificate of Assessment, and overruling defendants' objections to the admission of said Exhibits in evidence and testimony relating thereto;

(b) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 7, purporting to be a notice and demand for tax, and overruling defendants' objection to the admission of said Exhibit in evidence and testimony relating thereto;

(c) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 4, purporting to be a photostatic copy of a letter dated December 30, 1936, assertedly signed by Mr. Antonini, President of Livermore Winery, Inc., and overruling defendants' objection to the admission of said Exhibit in evidence and testimony relating thereto;

(d) In admitting in evidence over defendants' objection an alleged conversation or statements allegedly made by Mr. Renteria to Mr. Bulfinch on December 28, 1936, at Livermore, California, and testimony by Mr. Bulfinch as an alleged expert regarding the still and its probable operation, lo-

cated on the Livermore Winery Distillery premises;

(e) In admitting in evidence over defendants' objection testimony of Mr. Bulfinch relating to his calculation of the alleged loss of brandy and records in connection therewith; and

(f) In requiring defendants to proceed with the cross-examination of witness Arthur F. Bulfinch without production of the plans by plaintiff as to which said witness had testified in his direct examination, for [52] purposes of cross-examination, in order to establish or contradict the testimony of such witness, which plans were then in the possession and under the control of plaintiff.

(15) In denying defendants' motion for dismissal of the action or judgment in favor of defendants upon the conclusion and submission of the case of plaintiff;

(16) In denying the motion of defendants for entry of judgment in favor of the defendants upon the conclusion and submission of the entire case;

(17) In denying defendants' motions to strike from the record plaintiff's Exhibits 1, 4, 5, 6 and 7.

Dated: September 22, 1945.

ROBERT H. FOUKE,
HANS A. KRUGER,
Attorneys for Appellants.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Sept. 24, 1945. [53]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 53 pages, numbered from 1 to 53, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of United States of America, Plaintiff, vs. The Saint Paul Mercury-Indemnity Company of Saint Paul, etc., and Livermore Winery, Incorporated, a California Corporation, Defendants, No. 22591, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of $8.20 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 24th day of September, A. D. 1945.

[Seal] C. W. CALBREATH,
Clerk.

By M. E. VAN BUREN,
Deputy Clerk. [54]

In the Southern Division of the United States District Court, in and for the Northern District of California

Before: Hon Michael J. Roche, Judge.

No. 22,591-R

UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, A Delaware Corporation of Saint Paul, Minnesota, and LIVERMORE WINERY, INC., a California Corporation,

Defendant.

Tuesday, December 19, 1944

TRANSCRIPT OF PROCEEDING

Counsel Appearing: For Plaintiff: Albert S. Guerard, Esq., Assistant United States Attorney. For Defendant: Robert J. Fouke, Esq., Hans Kruger, Esq.

Mr. Guerard: If your Honor please, we offer in evidence a photostatic copy of Monthly Return of Fruit Distiller, Form 15, Treasury Department, executed by G. B. Antonini, as President of the Livermore Winery, Inc., before a Notary Public.

Mr. Fouke: No objection.

The Court: It may be admitted. [1]

(The document was marked Plaintiff's Exhibit 1 in evidence.)

Mr. Guerard: Next we offer in connection with that a letter signed by Q. J. Boone, Acting District Supervisor, dated January 19, 1937, addressed to the Livermore Winery, relating to Form 15, Exhibit 1. We ask that that be marked Plaintiff's Exhibit 1-A.

Mr. Fouke: No objection.

(The document was marked Plaintiff's Exhibit 1-A in evidence.)

Mr. Guerard: Next we will ask to have marked Exhibit 1-B, because it relates to Exhibit 1, Monthly Return of Fruit Distiller, Form 15, signed by G. B. Antonini, President of the Livermore Winery, and sworn to before a Notary Public.

Mr. Fouke: No objection.

The Court: It may be admitted.

(The document was marked Plaintiff's Exhibit 1-B in evidence.)

Mr. Guerard: I am going to introduce next as Plaintiff's Exhibit No. 2 a photostatic copy of Fruit Distiller's Bond, Form 30½, executed on November 6, 1936, by Livermore Winery, Inc., by its attorney-in-fact, and Saint Paul Mercury-Indemnity Company of Saint Paul, by its attorney-in-fact.

Mr. Fouke: No objection.

The Court: It may be admitted.

---

*Page numbering appearing at top of page of original Reporter's Transcript.

(The document was marked Plaintiff's Exhibit 2 in evidence.) [2]

Mr. Guerard: We next introduce a photostatic copy of a letter dated May 25, 1936, to Livermore Winery, Inc., and signed by J. H. Maloney, District Supervisor of the Internal Revenue Department. It is also addressed to the Saint Paul Mercury Indemnity Company. The exhibit shows that it was sent by registered mail and return receipt was requested, and attached to the exhibit is a photostatic copy of the return receipt from Livermore Winery, Inc., and Saint Paul Mercury-Indemnity Company.

Mr. Fouke: No objection.

The Court: It may be admitted.

(The document was marked Plaintiff's Exhibit 3 in evidence.)

Mr. Guerard: Next we offer as Exhibit 4 a photostatic copy of a letter dated December 30, 1936, signed by the President of Livermore Winery, Inc., subscribed and sworn to before A. F. Bulfinch, Inspector, to the District Supervisor, Internal Revenue Service, Alcohol Tax Unit, San Francisco, California, which is an application made for return of the tax on 1619.56 proof gallons of brandy lost by casualty, reciting the circumstances to establish the direct loss by casualty as being 1619.56 gallons.

Mr. Fouke: It is objected to on the ground that in the first place the statements therein contained are hearsay; in addition, no foundation has been laid indicating that the person who signed that

letter had the authority or was acting [3] for or on behalf of defendant, as an officer of the corporation; moreover, it sets forth data as to which no foundation has been laid.

Mr. Guerard: In reply to what Mr. Fouke has just said, your Honor upon reviewing this exhibit will find it is under the corporate seal of the corporation and it is signed by the president of the corporation. Now, if the president of a corporation is not charged with knowledge I don't know who it would be.

Mr. Fouke: Here is a photostatic copy, it is not a certified copy of the original; no foundation has been laid that the original is not available or that it is an original, nor the circumstances under which it was sent, or the parties to whom it was directed, or whether it was in fact received. None of those facts have been proved as far as foundation is concerned.

Mr. Guerard: It was received or we would not have it.

The Court: The objection is it is not the best evidence.

Mr. Fouke: The objection is on the ground it is not the best evidence.

Mr. Guerard: I have never heard of any attorney objecting to an exhibit where the signature of the president of the corporation, represented by him, is clearly indicated thereon, and with the corporate seal attached.

The Court: Let it be marked for identification.

Mr. Guerard: We will ask that it be marked for identification. [4]

Mr. Fouke: To be stricken if the proper foundation is not laid?

The Court: Yes.

(The document was marked Plaintiff's Exhibit 4 for Identification.)

MARGARET WOODS,

called as a witness by plaintiff; sworn.

The Clerk: Will you state your name to the court? A. Margaret Woods.

Mr. Guerard: Miss Woods, where do you reside, where do you live?

A. In San Francisco?

Q. By whom are you employed?

A. In the office of the Collector of Internal Revenue, San Francisco.

Q. Have you any particular title in connection with your work?

A. I am chief of the assessment section of the miscellaneous tax division.

Q. Miss Woods, I now show you a document consisting of two pages, on Form 23-C of the Treasury Department, which is an assessment certificate for the First District of California for the month of March, 1937, and ask you if this paper has been in your possession and is still presumed to be in your possession by reason of your employment by the Internal Revenue Division?

(Testimony of Margaret Woods.)

Mr. Fouke: I object to the question on the ground it calls for the conclusion of the witness, that it is compound and unintelligible and misleading, and likewise it presupposes something [5] that is not in evidence, namely, that it is an assessment certificate. It is incumbent upon the Government to prove the nature and character of the certificate and that it was properly set forth in accordance with the law which provides for the setting up of an assessment certificate.

The Court: What is this document that you have in your hand?

A. This original document is the assessment certificate which is signed and served by order of the Commissioner of Internal Revenue in Washington, D. C.

Mr. Fouke: I will object to that and move that it be stricken out.

The Court: How do you know that is his signature?

A. Well, it is the signature which our office accepts as being his signature.

The Court: Proceed.

Mr. Fouke: What is the ruling on my objection on the ground that it is not the best evidence?

The Court: I will allow the question. Objection overruled. She may answer.

A. Yes, that is right.

Mr. Guerard: Q. That shows that the amount of the assessment is $3239, does it?

Mr. Fouke: I object to leading the witness.

(Testimony of Margaret Woods.)

Mr. Guerard: I will withdraw that.

Mr. Fouke: Might I ask at this time that it will be deemed [6] that as to any objection which is overruled an exception has been taken to the ruling?

The Court: All right.

Q. What does that document show?

Mr. Guerard: What does that document show?

A. It shows an assessment against the Livermore Winery, Inc., at Livermore, California, in the amount of $3239.

Q. Is that all that it shows?

A. An explanation for the assessment.

Mr. Fouke: I move the answer go out, it is not responsive to the question in that it appears there are more items on there than the item to which the witness' attention has been called. The question was as to what does it show.

The Court: Is there anything else there?

Mr. Guerard: Is there anything else there on that form relating to that sum of money?

A. Yes, there is an explanation in the remarks column which states: "Tax on 1619.56 proof gallons brandy."

Mr. Fouke: If your Honor please, I am going to object to all this line of questioning on the ground that there has been no foundation laid. I would like at this time to object to this entire line of questioning because this document is not in evidence at the present time and there has been no foundation laid. As I pointed out earlier, it is

(Testimony of Margaret Woods.)

incumbent upon the Government to establish the nature and character of the [7] assessment, upon what it was based, and that it was in accordance with the law as to the method and character of making the assessment, and that the items thereon are true and correct, none of which foundation has been laid.

Mr. Guerard: You are correct as to that. There is no purpose in the question I propounded to the witness to show that that amount is the correct amount, nor that it represents the actual loss sustained by your client. I am simply identifying it as a record of the office.

Mr. Fouke: But before any of this information can be testified to, it is incumbent upon them to show the basis for that.

The Court: I don't know what is to follow, but I will allow it.

Mr. Guerard: I will follow it up with proper proof.

The Court: It will go out if it is not connected up.

Mr. Fouke: It will go out if it is not connected up?

The Court: Yes.

Mr. Guerard: If your Honor please, we will introduce this original document and ask that we be permitted to withdraw it for the purpose of furnishing a photostatic copy to the defendant. I think Mr. Fouke has intimated to me that he would

(Testimony of Margaret Woods.)

like to have a copy of it. If he does, we will have it made and we will be happy to accommodate him.

Mr. Fouke: I object to the introduction of this assessment certificate on the ground that it is not the best evidence; [8] moreover that this witness is not competent to identify the exhibit that has been offered in evidence. It purports to be signed by an individual whose signature has not as yet been identified as being the signature of the Commissioner of Internal Revenue, and moreover there has been no foundation to show that this record was made under the supervision of the witness, or that his signature was signed in her presence, or that she was familiar with the signature, and does not know it to be the signature. For those additional reasons I am going to object as well as that it is not the best evidence of the facts contained therein.

Mr. Guerard: In connection with the exhibit we now offer in evidence a certified copy of the assessment certificate now being discussed, that is, the first page thereof, which is duly authenticated with the seal of the United States of America, and recites, "Pursuant to the provisions of section 661, Chapter 17, Title 28 of the United States Code (section 882 of the Revised Statutes of the United States), I hereby certify that the annexed copies of assessment certificate, Form 23-C, and assessment list, Form 23-A, involving the case of the Livermore Winery, Inc., Livermore, Calif., are true copies of said documents."

Mr. Fouke: I wish to object to this on the

(Testimony of Margaret Woods.)

ground that it is not a true and correct copy of the documents which have been submitted and sought to be introduced in evidence, in that on [9] this second page, as your Honor will observe by looking at this exhibit, here, are set forth all of the various accounts and records on the assessment list whereas on this they single out one particular one, the one in controversy, and moreover there are interlineations in here and pencil notations which have certain meaning, which are incompetent even as to this particular loss, and therefore it is not a true and correct copy of the original.

Mr. Guerard: We are not offering it as any proof as to the amount of loss. We are simply introducing it as a part of the records of the Internal Revenue Department; we expect to follow it up by adequate proof that the amount arrived at as being due to the Government was arrived at accurately and in accordance with the statute, and the amount of loss indicated upon the paper was arrived at properly by various men whose business it is to reach this conclusion.

The Court: I will allow it to go in subject to your motion to strike and over your objection.

(The certified copy of assessment certificate is marked Plaintiff's Exhibit 5 in evidence, and original certificate of assessment was marked Plaintiff's Exhibit 6 in evidence.)

Mr. Guerard: Q. I now will show you Form 17 of the Treasury Department dated May 4, 1937 —this is a copy—I now show you a copy of Form

(Testimony of Margaret Woods.)

17 of Notice and Demand for Tax, dated May 4, 1937, showing the name and address of Livermore Winery, Inc., assessment [10] $3239, balance due $3239, tax on 1619.56 proof gallons body distilled spirits and ask you if that notice and demand was sent out to the Livermore Winery by you?

A. Yes, the original notice was sent out by me.

Q. The original was sent out and that is a copy of the original?

A. This is a copy of the original notice which was sent.

Mr. Fouke: I am going to object to the notice as not the best evidence; the original, or copy of the original, a duplicate original copy would be the best evidence if there are such records available.

Mr. Guerard: There is no such record available. Even a copy is not kept.

The Court: The objection will be overruled. I will allow it.

Mr. Guerard: Q. On this same sheet of paper I show you a second notice and demand for tax dated May 15, 1937, to the Livermore Winery, Inc., showing the amount of tax due at that time as $3239, 5 per cent penalty $161.92, and interest of $5.82, as of that date, and ask you if that is a correct copy of the notice we are now referring to and was mailed to the Livermore winery by you?

Mr. Fouke: Same objection, your Honor, that it is not the best eivdence.

The Court: The same ruling.

A. Yes. [11]

(Testimony of Margaret Woods.)

Mr. Gerard: I will now introduce this as our next exhibit 7.

The Court: It may be admitted.

(The notice and demand for tax is marked Plaintiff's Exhibit 7.)

Mr. Guerard: In connection with your duties, Miss Woods, do you calculate the amount of interest and penalties?

Mr. Fouke: I am going to object to that as being a conclusion of the witness.

Mr. Guerard: Q. State whether or not in connection with your duties you do figure the amount of interest on a tax indebtedness to the Government?

Mr. Fouke: The same objection.

The Court: The objection is overruled.

A. Yes.

Mr. Guerard: In that connection and relating to the item which we have just been discussing and as shown in the previous exhibit showing the indebtedness of $3239, have you or have you not figured the interest on this sum of money from the date of the first notice May 4, 1937, to this date, December 19, 1944?

Mr. Fouke: Objected to as a double question, "have you or have you not."

The Court: She may answer "Yes" or "No."

A. Yes, I have.

Mr. Guerard: Q. What interest did you arrive at?

(Testimony of Margaret Woods.)

A. The amount of interest computed to and including December 19, [12] 1944, was $1481.71.

Mr. Fouke: I object to the answer and move that it be stricken, in that it calls attention to sums of money which are not set forth in the complaint or even asked for.

Mr. Guerard: The statement of counsel is not correct because the prayer asks for relief in the sum of $3239, together with interest penalties and costs of this suit.

The Court: Let the question and answer stand.

Mr. Guerard: That is all.

Cross-Examination

Mr. Fouke: Q. What are your duties at the office of the Collector of Internal Revenue?

A. I am chief of the assessment section.

Q. As such what are your duties there?

A. My duties comprise the assessing of internal revenue taxes and the issuing of notices and subsequent notices and demands for outstanding taxes.

Q. Are there any other persons in your division that do that? A. There are.

Q. Are you under their supervision and jurisdiction?

A. Not in that section. I am chief of a section.

Q. There are others in that section?

A. Yes.

Q. And in connection with the various assessments that go out do you personally prepare all

(Testimony of Margaret Woods.)

of the notices and demands and records of the section or didn't others in that section prepare those notices and demands?

A. They do at the present time. [13]

Q. When was the procedure any different than it is at present?

A. I prepared personally and mailed all notices and demands from the 1st of October, 1936, to the end of November, 1944.

Q. And was it the practice to keep an office copy or record of all notices and demands and other papers that were prepared by you?

A. There is no office copy of notices and demands for taxes.

Q. Are there any copies of these notices and demands kept for any purpose in connection with the Department of Internal Revenue, to your knowledge?

Mr. Guerard: I don't quite understand the question.

Mr. Fouke: I mean when you send out a notice is it the custom to type but one copy of it?

A. Yes.

Q. Aren't more than one copy prepared of any notice and demand?

A. No, just the original copy is prepared.

Q. And no other one? A. No.

Q. Then how can you testify at this time, as you have, that this is a copy of the notice and demand for the taxes if in fact as you testify now there were no copies of the notices and demands typed?

(Testimony of Margaret Woods.)

A. Because that notice is an actual copy of the assessment list as it was taken off.

Q. You don't know whether this is a copy, or not, do you?

A. That is not an actual copy of the original notice of May 4.

Q. Nor is this other second notice and demand an actual copy? A. No.

Mr. Fouke: Then I am going to move that this be stricken out on the ground that they do not purport to be what they were [14] represented to the court to be.

The Court: Who prepared these copies, do you know?

A. I did.

Q. When?

A. I don't know the actual date.

Q. How did you prepare it by the office of District Supervisor of the Alcohol Tax Unit.

Q. For the purpose of this case? A. Yes.

Q. How long ago was that?

A. I don't know, but I would say it was possibly two years or more.

Mr. Fouke: This purports to be dated May 4, 1937. She prepared it five years thereafter. I would like to renew my motion to strike out. This purports to be a copy and she testified that it is not a copy of it.

Mr. Guerard: In connection with the motion to strike, I will ask the witness this question:

Q. These notices that you have testified to as

(Testimony of Margaret Woods.)

being copies of the notices sent under the date of May 4 and May 25, 1937, to the Livermore Winery, as I understand it those exhibits are not actual office copies? A. No.

Q. From what source did you prepare the copy of the notices indicated on this exhibit, how did you prepare them?

The Court: What did you get it from at the time?

A. I copied this first notice, Form 17, from the assessment list, and dated it according to the date which was listed on our [15] invoice list.

Q. Now, as to the second one.

A. I prepared that in the same manner and dated it in the same manner.

Mr. Guerard: If your Honor please, that is perfectly legitimate proof. It would be impossible in any office, even in a lawyer's office, to have copies of everything on a printed form; the printed form is used and filled out from data on hand in the office, and this young lady is testifying from data in her office and in her possession, and she prepared the original notices, and these copies were prepared from the records maintained by her.

Mr. Fouke: One of the issues of this case is the fact that due process has been observed and all of the provisions of the statute have been complied with. It is our position they have not been and this is an element of proof and it is incumbent upon the Government to establish these facts. Now, I

(Testimony of Margaret Woods.)

will ask one further question with regard to that, the information that is contained in this.

The Court: Indicate what you refer to.

Mr. Fouke: Q. The information contained, first, on this Form 17, is that information which you personally deduced from the assessment list or record as being the information that should be put on there, or does it represent a true and correct copy of the assessment list?

A. That is an entry made and transcribed from this assessment list. [16]

Q. In other words, it is a true copy?

A. No.

Q. This is your own conclusion?

A. Yes.

Q. Your conclusion might be different in one instance than in another instance, isn't that true?

A. No, I get the information from the assessment list.

Q. You use some of the information but it is not a copy of the assessment list as such in the sense there is not full information there?

A. That is right.

The Court: I will allow both of these documents to remain in evidence. Proceed.

Mr. Fouke: Subject to a motion to strike?

The Court: Yes.

Mr. Fouke: Q. In other words, it is your testimony that all records with respect to assessments and demands were under your jurisdiction and that

(Testimony of Margaret Woods.)

you personally incorporated those records in these notices and mailed them out?

A. I was charged with the responsibility of the preparation and mailing of these notices and demands at that time, yes, I was not in charge.

Q. Did you at any time have any others working with you in 1937 in the month of May?

A. There were other employees in the office.

Q. There were other employees working with you at the same time?

A. Not with me on my work, no.

Q. Did any other employee ever prepare any of these notices? A. No, they did not. [17]

Q. Isn't it a fact that other employees made out notices and records other than yourself?

A. Not notices and demands; those were my personal responsibility, and I deposited them in the mail box after I had prepared them.

The Court: Have you any independent recollection of these?

A. No, I have not.

Q. But you are satisfied that you made them up, yourself?

A. Yes, I typed them out, it was my responsibility to do so.

Mr. Fouke: But these are not copies of the records that you sent out at the time, and it was not the practice to keep a copy?

A. No.

Q. So that you cannot testify at this time that

(Testimony of Margaret Woods.)

these are copies, as they purport to be, of the notices that actually were sent out at that time?

A. No, they are not copies of the original notices.

Mr. Fouke: That is all.

Mr. Guerard: That is all.

(A recess was thereupon taken until 2:00 o'clock p.m.) [18]

Afternoon Session,

December 19, 1944, 2 P.M.

Mr. Guerard: Before proceeding there are two matters which I desire to call to the Court's attention, and that is in paragraph I of our complaint relating to the authority for bringing the action, Mr. Fouke has now stipulated as to the authority therein contained as to the first paragraph of the complaint, so it will be unnecessary for us to make any proof in that regard.

The Court: What is the stipulation?

Mr. Fouke: It is, in effect, that the Court has jurisdiction to proceed with the action as to the defendants, 1, on the basis of liability, if any, and, 2, on the basis of the surety bond that was issued, if there is any liability.

The Court: Very well. Call your next witness.

ALMON C. JONES,

called as a witness for the plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. Almon C. Jones.

Mr. Guerard: Q. Mr. Jones, what is your business or occupation?

A. I am employed in the Bureau of Internal Revenue, Alcohol Tax Unit.

The Court: In what capacity?

A. Chief of the Bond Account Division. [19]

Q. What does your activity consist of?

A. That division supervises the auditing of all the reports submitted by production plant proprietors and gaugers assigned to such plants, and also has to do with the issue of authority to operate such plants, including the acceptance of the bond and approval of the invoices filed by the proprietors.

The Court: Proceed.

Mr. Guerard: Mr. Jones, I show you now Plaintiff's Exhibit No. 4, which has heretofore been introduced, being a letter, a signed copy of a letter dated December 30, 1936, to the district supervisor, Internal Revenue Service, Alcohol Tax Unit, San Francisco, California, and signed by the President of the Livermore Winery, with the corporate seal, and sworn to before Mr. Bulfinch, an inspector, and received in the office of the inspection division on December 30, 1936, and ask you if this is a true copy, photostatic copy of the letter in question.

A. That is an exact photostatic copy of a letter

(Testimony of Almon C. Jones.)

addressed by the Livermore Winery under date of December 30, 1936, to the district supervisor, for the purpose of claiming remission of tax on a certain amount of brandy lost at the distillery during the month of December. I have in my file here——

The Court: 1936?

A. December 30, 1936. I have in my file a carbon copy of the original, here, which is signed by the president, Mr. Antonini, of the Livermore Winery, Inc., and the copy bears the corporate seal.

Mr. Fouke: If your Honor please, to the extent that the witness' answer states that it is signed by Mr. Antonini, President of the Livermore Winery, Inc., I move that portion of his answer go out on the basis there has been no foundation laid to the effect that Mr. Antonini was then or at all ever was president of the Livermore Winery.

The Court: That may go out.

Mr. Guerard: We introduced this originally, you recall, for identification, and I am now identifying it.

Q. The original copy has been in your possession for some time, has it?

A. Yes, since filing.

Q. Since filing? A. Yes.

Q. And the filing date is what?

A. December 30, 1936.

Q. This is a true photostatic copy?

A. That is correct.

Mr. Guerard: That is all.

(Testimony of Almon C. Jones.)

Cross-Examination

Mr. Fouke: Q. Were you present, Mr. Jones, at the time this letter was submitted to the department?

A. I was.

Q. Who else was present on that occasion?

A. Well, lots of different people were present, there are about fifty people in that division.

Q. Were you present on the specific occasion that the letter, itself, was delivered to some individual in the department?

A. That letter with an inspection report was received by me.

Q. This was received by you? A. Yes.

Q. Did Mr. Antonini deliver this to you personally? A. No, he did not.

Q. Then you don't know whether Mr. Antonini signed this, at all, do you? A. No.

Q. Do you know by whom this was prepared?

A. I have no idea.

Q. Isn't it a fact that it was typed in the office of your department on the day in question?

A. I have not any reason to believe that was the case.

Q. But it was not delivered to you with an inspection report? A. Yes, it was.

Q. By some other person, but not by Mr. Antonini? A. That is right.

Q. You don't know Mr. Antonini, do you?

A. No.

(Testimony of Almon C. Jones.)

Q. You don't know his signature?

A. No, I do not.

Mr. Fouke: No further questions.

ARTHUR F. BULFINCH,

called as a witness for Plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. Arthur F. Bulfinch.

Mr. Guerard: Q. Mr. Bulfinch, what is your position, if any, with the Government?

A. Inspector in the Alcohol Tax Unit, Bureau of Internal Revenue.

Q. Were you so employed in December, 1936?

A. I was.

Q. I now show you Plaintiff's Exhibit No. 4, which has been [22] introduced in evidence here a few moments ago——

Mr. Fouke: Just a moment. This was not offered in evidence, it was offered for the purpose of identification. Are you now offering it in evidence?

Mr. Guerard: When I get through here I am going to offer it in evidence. I am going to prove the signature of the man first.

Q. Was that letter signed in your presence?

A. That was signed in my presence, yes.

Q. Whom was it signed by?

A. Mr. Antonini, the President of the Livermore Winery, Inc.

(Testimony of Arthur F. Bulfinch.)

Q. Did he take an oath that it was correct?

A. He subscribed to it and swore to it.

Q. And you are a qualified person to administer oaths, are you, under the statute of the United States?

A. As an inspector in the Internal Revenue Service I am.

Q. Was the seal of the corporation placed upon the second page of this document in your presence? A. Yes, it was.

Mr. Guerard: Now, if your Honor please, we offer Exhibit 4 For Identification in evidence.

Mr. Fouke: Before it is received in evidence I would like to cross-examine the witness.

The Court: You may.

Mr. Fouke: Q. Mr. Bulfinch, on December 30, 1936, do you recall where you were on that day?

A. For the purpose of [23] identifying where that was signed?

Q. Just answer my question.

A. I was in San Francisco.

Q. Just where in San Francisco were you at the time?

A. During part of the day I was in the office of the Alcohol Tax Unit, and I was also present at the office of F. E. Mayhew, at which point Mr. Antonini signed that paper.

Q. What time of the day was it that you were at the office of Mr. Mayhew?

A. I believe it was in the morning.

Q. Where is the office of Mr. Mayhew located?

(Testimony of Arthur F. Bulfinch.)

A. They had moved several times, but I believe it was at 1182 Market Street at that time.

Q. Who was present on that occasion?

A. Mr. Antonini and Mr. Groci, one of the partners of the winery.

Q. Was Mr. Mayhew present?

A. Mr. Mayhew I do not believe was present. I do not believe he was living at that time.

Q. In 1936?

A. I do not recall just when he did die.

Q. Did you go any place else in the City and County of San Francisco in connection with your official duties on that day?

A. I could not answer that.

Q. Do you know whether you did not go some place else on that day?

A. No, I could not say that.

Q. What is your best recollection as to what you may have done on that occasion?

A. It is probable that I had other duties to perform.

Q. Then you witnessed the signature of this document in the [24] office of Mr. F. E. Mayhew?

A. Yes.

Q. Do you know where the office of the Livermore Winery was located on December 30, 1936?

A. I was familiar with their Livermore office, but not their local office.

Q. Isn't it a fact that they had an office in the City and County of San Francisco, State of Cali-

(Testimony of Arthur F. Bulfinch.)

fornia, on that date, where their business was transacted? A. They probably did.

Q. To the best of your recollection did you appear at that office?

A. No, I did not go to that office.

Q. Do you recall ever having gone to that office?

A. I don't know whether it was the same office that they had at that time, or not. Sometime later they had an office on Fillmore Street, and I was there, but I don't know whether that was the same office they had at that time, or not.

Q. Did you go to an office on Clay Street?

A. I do not believe I did.

Q. But you did not go on that particular day?

A. No.

Q. Do you know who prepared this letter?

A. It was probably prepared in the office of Mayhew & Company, who were their brokers.

Q. Do you know from what source the statistical data that appears on this letter was procured?

A. Might I see that?

Q. Yes.

A. It is identical with the information that I received at the winery at the time.

Q. Isn't it a fact that you made that information available on that occasion?

A. I rather believe I did at the time.

Q. Isn't it likewise a fact that the other information that [25] was contained in here and included in the letter was information which you submitted for inclusion in the letter?

(Testimony of Arthur F. Bulfinch.)

A. From the facts as I had found them at their winery, and from any other information which they had they prepared that claim for remission of tax.

Q. So this purports to be a claim for remission of tax? A. That is correct.

Q. It was from information which you supplied at Mr. Mayhew's office on December 30, 1936?

A. It was at least partly from that information.

Q. Is there any portion of that that was not from that information?

A. That is all the information I had, but I could not say that I provided it to them.

Q. Didn't you in substance tell them exactly what took place here, and didn't they then at that time, and while you were there, prepare this letter?

A. We had a discussion about what had taken place.

Q. Didn't they, upon your representation that such information should be set forth, write this letter?

A. In any claim or any kind of loss before any action can be taken on either allowing or disallowing the loss there must be information based on the fact for submitting that claim.

Q. Upon information which you provided to them?

A. That would not necessarily be information that I provided, because that was four days after the loss, and it would appear that they [26] would have access to all the information at the plant, just as I had got it.

(Testimony of Arthur F. Bulfinch.)

Q. But so far as you know this was prepared at that time, and did you observe who prepared this?

A. I don't recall who did prepare that.

Q. Might I ask you whether or not the gentleman whose signature you attested or swore to it prepared it personally?

A. I do not believe he did prepare it personally.

Q. Did you observe that he read this over?

A. He read it over.

Q. Do you know whether he read it over quickly, or not?

A. He read it over very normally and discussed it at the time.

Q. Do you know Mr. Antonini?

A. I did know him at the time.

Q. Do you know what nationality he is?

A. That I could not say.

Q. Do you know whether he speaks English very clearly? A. Reasonably.

Q. Does he speak as reasonably clearly as I do, for example?

Mr. Guerard: I object to that as calling for the conclusion of the witness and not proper cross-examination.

The Court: In order to identify him I will allow it. Do you recall?

A. I have not seen Mr. Antonini for a least six years.

Q. What is your memory of him?

A. I do recall that he was there, and that he signed the paper, that is, after discussing it, and

(Testimony of Arthur F. Bulfinch.)

that I asked him before he signed if that was the true facts of the case, and he said yes. That was his statement. [27]

Mr. Fouke: Q. Do you recall that he spoke good English?

A. He could speak English, I don't recall how well he did.

Q. Was the seal that purports to be the seal of the Livermore Winery impressed upon the original of this document at that time in your presence?

A. Yes, it was.

Q. And you saw this seal at that particular place? A. Yes.

Q. I am asking you whether you saw the seal.

A. I saw the seal in the place.

Q. And you were present at the time?

A. Yes.

Q. And was at Mr. Mayhew's office?

A. Yes.

Q. Then you subscribed to this immediately thereafter? A. Yes.

Q. Then what, if anything, was done after that time? A. That was submitted with my report.

Q. By whom?

A. By me to the chief inspector of the division.

Q. Did you take this away with you at that time? A. Yes, I did.

Q. You did not leave a duplicate original with Mr. Antonini? A. I am quite sure we did.

Q. You don't recall, do you?

A. Not specifically. I don't know of any case in which I have taken such a claim for remission of

(Testimony of Arthur F. Bulfinch.)

tax where I did not leave a duplicate copy with the person.

Q. Is it customary for an inspector to assist others in the preparation of claims for remission of tax?

A. To the extent of giving them information which is pertinent to the case.

Q. The inspector is supposed to advance the information to be included for the purpose of the case as he sees it? [28]

A. On the statement of facts, yes.

Q. So then on a statement of facts, it was customary for you to advance a statement of facts and have it included in the claim for remission?

A. I explained the facts that I had available to the person.

Q. Did you discuss with Mr. Antonini prior to the execution of this letter whether he knew of his own knowledge what had taken place?

A. I do not believe I did.

Q. Did he tell you anything as to being personally present at the Livermore Winery premises at any time on December 26th or December 27th, 1936?

A. I do not believe he was present.

Q. You do not believe he was present?

A. No.

Q. So that so far as any statement herein contained, it would be hearsay information that he received from somebody else?

Mr. Guerard: I object to that question on the

(Testimony of Arthur F. Bulfinch.)

ground it calls for a legal opinion and an improper question on cross-examination.

The Court: It is calling for an opinion. I will sustain the objection.

Mr. Fouke: I will reframe the question.

Q. You stated, Mr. Antonini, in your opinion, to your knowledge, was not present at the winery premises on December 26th or December 27, 1936?

A. He was not there during the time I was there on December 28th. The 26th was the night of the loss, it started at 11:50 p.m. [29]

Q. Do you know that the loss was occasioned at 11:50, started at 11:50, were you there?

A. I was not there. That was information given to me at the time I was there on December 28th.

Mr. Fouke: I move that that go out.

The Court: That may go out.

Mr. Fouke: Q. Were you at the premises at all on December 26th, 1936?

A. No.

Q. Were you on the premises or at the premises on December 27, 1936? A. December 27, no.

Q. When were you first on the premises?

A. On December 28th.

Q. December 28th? A. Yes.

Q. So that so far as you are concerned this information was information which was furnished at the time in question on December 30 by you to Mr. Antonini, and the letter was prepared and delivered to you—was prepared and signed by Mr. Antonini?

(Testimony of Arthur F. Bulfinch.)

A. I would not be prepared to say it was entirely from my information because of the fact that that information was available, and Mr. Groci, the vice-president, was at the winery on December 28th.

Q. That is, if he was there at the time?

A. He was there at the time.

Mr. Fouke: I am going to object to the introduction of this exhibit, Plaintiff's Exhibit 4 for Identification, on the ground that there has been no foundation laid showing that Mr. Antonini was at the time in question the president of the Livermore [30] Winery, or that it was executed pursuant to any authority that he might have had for or on behalf of that concern, as an officer or otherwise, nor is there any foundation laid thus far to establish that he had or could have had any actual knowledge as to the facts or circumstances set forth in this letter dealing with conditions that occurred at a time or place when he was not present, and that at best it would be hearsay evidence, and that the best evidence would be that of whomsoever might be accused to have been the individual who might have been guilty of any particular act which is the gist of the cause of action sued upon here, or one of the principal causes of action. The witness could be brought in.

The Court: Who?

Mr. Fouke: The person who is referred to in this particular exhibit.

The Court: The witness saw him sign the document.

(Testimony of Arthur F. Bulfinch.)

Mr. Fouke: He saw him sign the document, but as to the facts that are set forth in the document, the point I am making is that the statements were received from Mr. Bulfinch and presented at the time to Mr. Antonini.

The Court: The witness testified the same information was available at the plant, accessible to the vice-president. I am prepared to rule on this document.

Mr. Fouke: But the point that I am making is that unless there is a foundation laid to the effect that this was within the [31] knowledge of Mr. Antonini he could not bind the Livermore Winery with the statements that appear herein.

The Court: The objection is overruled and the exhibit may be admitted.

(Plaintiff's Exhibit 4 for Identification was received in evidence.)

Mr. Guerard: Q. Mr. Bulfinch, you have just testified that you were at the plant of the Livermore Winery on December 28, 1936. Is that correct?

A. That is correct, yes.

Q. You had some conversation, didn't you, with Mr. Groci, the vice-president, or who was held out to be vice-president of the winery, did you?

A. Mr. Groci was there and we discussed the loss.

Q. You were there on December 28th?

A. Yes.

Q. Mr. Groci, the vice-president, or rather who

(Testimony of Arthur F. Bulfinch.)

held himself out to be vice-president of the winery, was also there, was he? A. Yes.

Q. Did you, together with Mr. Groci, inspect the premises? A. We did.

Q. Just go ahead and tell his Honor what observations you made on the ground when you got there on December 28th?

Mr. Fouke: I am going to object to that as calling for the conclusion of the witness, likewise the question is indefinite. The best evidence would be what he saw.

Mr. Guerard: I will withdraw that. [32]

Q. Did you go to the winery on the 28th?

A. I did. I was told to go to the winery, that there had been a loss there immediately after reporting for work at 8:30. I went by automobile to the winery, arriving about ten o'clock.

Q. Whom did you first contact when you got there?

A. Mr. Joe Renteria, the still operator, and Mr. A. C. Browning the United States Gauger, who gauged the still.

Q. Proceed.

A. At the time of the visit to the two distilleries the floor in and around the still column was wet; it was wet underneath the brandy receiving tank. The brandy receiving tank No. 2 was filled to capacity with liquid that was a mixture of brandy and water. Receiving tank No. 1 was about half full of water. There was no evidence of alcohol in that, and the sump on the floor of the distillery

(Testimony of Arthur F. Bulfinch.)

contained a mixture of water and wine sediment and brandy, with some alcohol in it. Joe Renteria at that time stated that he had been operating the still.

Mr. Fouke: I object until such time as the foundation is laid as to Joe Renteria.

The Court: Lay the foundation for Joe Renteria.

Mr. Guerard: During the inspection which you made and which you have just testified, Mr. Groci, who held himself out to be the vice-president of the winery, was present, was he?

A. Not during the early part of it. As I recall, Mr. Groci arrived somewhere around noon.

Q. And prior to that time and following that time who was present? [33] A. Joe Renteria.

Q. Did he hold himself out to be an employee of the winery?

A. He said that he was the night still operator.

Q. State whether or not he detailed to you what happened in connection with this overflow?

A. He did.

The Court: Who was present?

A. At that phase of the thing, Mr. Browning, Mr. Renteria and I were present.

Q. Was there any officer, known to you to be an officer of the Livermore Winery present on that occasion?

A. Not in the morning. However, the three of us were there in the morning, and then later in

(Testimony of Arthur F. Bulfinch.)

the afternoon, I believe it was, Mr. Groci arrived, and the whole matter was discussed again.

Q. During the time of your conversation in which you referred to Mr. Renteria being there, was there any officer of the Livermore Winery present that you knew to be an officer?

A. Not at that time.

Q. No one, at all?

A. Practically the same conversation was held later in Mr. Groci's presence, however.

Mr. Guerard: Q. We are speaking about that conversation, the conversation you spoke about, in which Browning, yourself, and Renteria were present.

A. Yes.

Q. On that occasion there was no officer of the Livermore Winery known to you to be such on that occasion?

A. I do not think Mr. Groci had arrived at that time. I do not believe he was there at that time. [34]

Q. But in the afternoon Mr. Groci was present?

A. Yes.

Q. And Mr. Renteria was also present?

A. Yes.

Q. These statements you are about to disclose were made by Mr. Renteria in the presence of Mr. Groci? A. Yes.

Q. And Mr. Renteria told you what had occurred, did he? A. He did.

(Testimony of Arthur F. Bulfinch.)

Q. Will you tell his Honor whether that was in the presence of Mr. Groci? A. It was.

Mr. Fouke: I am going to object on the ground it is hearsay at best, and that the best evidence is the individual, himself, as to what was said, and that it is not binding upon the defendant Livermore Winery, nor the defendant Saint Paul Mercury Indemnity Company, the surety under the bond.

The Court: The objection will be overruled.

Mr. Guerard: You may proceed and give the conversation.

A. Mr. Renteria said that on closing down the still for the week end on Saturday night, that would be December 26th, he had attached a water hose to a pipe line for the purpose of introducing water into the upper portion of the still so that the water would flow down from the top of the still column and clean off the sediment and undesirable residue. That he had left the premises without turning off the water, and that he had also forgotten to open a slop valve which would have allowed the water to run off.

Mr. Fouke: I am going to move that that be stricken out on [35] the ground it is not part of the res gestae, there has been no foundation laid, and on the ground of hearsay.

The Court: The objection will be overruled.

Mr. Guerard: Are you familiar, Mr. Bulfinch, with the general situation there, or were you

(Testimony of Arthur F. Bulfinch.)

familiar with it prior to your visit on December 28th?

A. I had made other inspections at the winery. I am fairly familiar with their two distilleries.

Q. Do you know what would follow if the valve that was just referred to was opened and not closed, and that the slop line valve was not opened—what would occur?

Mr. Fouke: Objected to as calling for the conclusion of the witness and opinion, there has been no foundation laid; the man has not been qualified as an expert or in anywise familiar with this transaction, and it is not material.

The Court: Do you know?

A. Yes.

Q. How do you know?

A. From examination of the still at that time, and from an examination of the still both before and since.

The Court: You may answer. The objection is overruled.

A. The still column would fill up with water, the water would flow up into the feeder line from the still over into the dephlegmator, from the dephlegmator would flood into the condensor, from the condensor would flow from the course ordinarily taken by the brandy at the time of being produced through a tribox on the operating platform of the still and from the tribox [36] would flow into the receiving tank.

Mr. Fouke: The same objection.

(Testimony of Arthur F. Bulfinch.)

Mr. Guerard: Q. Did you ascertain the number of inches shown on the gauge glass as to the brandy that had been run off having any certain proof?

Mr. Fouke: I will object to that on the ground it is indefinite as to time and place, moreover this witness is testifying to conditions that occurred on December 28th, two days after the alleged loss was supposed to have occurred, and not on the date when the loss was supposed to have occurred.

Mr. Guerard: We will go at it in a different way.

Q. Did Mr. Renteria give you any information in the presence of Mr. Groci as to the reading of the gauge glass on December 26 or December 27?

Mr. Fouke: That calls for yes or no.

A. Yes.

Mr. Fouke: December 26th or December 27th?

The Court: What date was it?

A. He gave me information as to the amount of brandy on hand at the time he discontinued distilling on December 26th.

Q. At the plant? A. At the plant.

Mr. Guerard: Q. What was that?

A. He had a rough log that it is customary to keep in which the still operator should write down on the log the reading of the receiving tank, and in some cases they show the number of gallons represented [37] thereby, and in this case it showed only the number of inches of brandy that was in the receiving tank.

(Testimony of Arthur F. Bulfinch.)

Q. How many did it show, according to Mr. Renteria? A. 78½ inches, as I recall.

Q. The log that you refer to, has that any form number or anything like that?

A. No, this was just a piece of scratch paper.

Q. Does the distillery use a form called No. 15?

A. A form No. 15-C.

Q. Was that exhibited to you by anyone?

A. Well, that was exhibited to me at the time of the inspection, I believe, by Mr. Groci.

Q. Does that show or did it show the calculated yield of material from the distillery from December 16, 1936, to December 26, 1936?

A. Yes, it did.

Q. Could you give us those figures? Have you anything in your file to refresh your recollection? We want to get the accurate figures.

A. There is a copy of the report that I wrote somewhere.

The Court: We will take a recess.

(Recess.)

Mr. Guerard: Q. Mr. Bulfinch, I now hand you Plaintiff's Exhibit No. 1, Monthly Return of Fruit Distiller. Who prepared that form?

A. That was prepared by the fruit distiller.

Q. You have seen that before, have you?

A. I have.

Q. Where did you see it?

A. I did not see this particular one, that is the printed copy that is sent as a monthly report to [38] the office of the district supervisor. The fruit dis-

(Testimony of Arthur F. Bulfinch.)

tiller maintains a daily record on the same form containing the figures in pencil and I saw that form at the winery on December 28.

Q. The figures were the same as this?

A. Yes.

Q. Is that correct?

A. Yes, that is correct.

Q. These figures indicate that the calculated yield from material distilled December 1, 1936, to December 26, 1936, was 4578.65.

Mr. Fouke: I object to the question on the ground that the witness has testified that he did not see this.

Mr. Guerard: Q. Was this figure of 4578.65 furnished to you by any officer, agent or employee of the Livermore Winery on December 28, 1936?

A. The rough copy of Form 15 was furnished to me by an employee in the presence of Mr. Groci on that date. The total of the calculated yield that is shown in that form, which was submitted to the district supervisor is the same as the total on the form which I examined at that time.

Q. This form shows that there was 4578.65.

A. That is correct.

Q. Does this form also show the amount gauged out?

A. The back of that form shows the amount gauged during the month of December.

Q. Was that figure furnished to you by some agent, servant or employee at the Livermore Winery? A. It was.

(Testimony of Arthur F. Bulfinch.)

Q. On December 28, 1936?

A. Yes it was.

Q. That form shows that the amount gauged out was 1678.02 proof gallons, is that correct?

A. That is correct. [39]

Q. Then after you got those figures you calculated the amount on hand, did you?

Mr. Fouke: I object to that as leading.

Mr. Guerard: All right, I will change it.

Q. Did you calculate the amount on hand?

A. I did.

Q. How did you make your calculation?

Mr. Fouke: Might I ask when, counsel?

Mr. Guerard: On December 28th.

A. The subtraction of the amount which had been gauged out from the amount that should have been produced from the calculated yield would give the figure of what should have been on hand on the conclusion of distilling on December 26th.

Q. You did make a calculation, did you?

A. I made the calculation.

Q. Do you remember what it was?

A. It approximately was 26 proof gallons more than the amount shown by the figures given me by Renteria.

Q. You figured that as lost by evaporation?

A. That would be probably the ordinary loss by evaporation.

Q. Then did you measure the diluted brandy? I am still speaking of December 28th; Did you measure the diluted brandy in the receiving tank

(Testimony of Arthur F. Bulfinch.)

and that which had collected in the distilling material sump? A. I did.

Q. Did you proof it? A. Yes.

Q. What did you find? [40]

Mr. Fouke: The same objection, there is no foundation laid for how or what method was used, or as to how he arrived at it.

Mr. Guerard: He said he calculated it.

Mr. Fouke: How?

Mr. Guerard: Will you explain just how you arrived at it, and whether you used a pencil and paper or ink, whatever you did; explain the mechanical procedure when you undertook to arrive at these figures for Mr. Fouke's benefit.

A. Each brandy tank is required by regulation to have stated thereon the capacity in wine gallons of the brandy-receiving tank. That capacity is tested by the Alcohol Tax Unit and from there that figure is accepted as the capacity of the tank. The tank being filled, the capacity in wine gallons was taken as shown by the marked capacity of the tank and the proof was determined by hydrometer and thermometer, making corrections for temperature.

Q. Right there, did you ascertain the proof?

A. We ascertained the proof of the spirits at the time.

Q. What proof did you arrive at?

A. The proof of the spirits of that tank I believe was around 55 at that time.

Q. Were you given any information by any agent, servant or employee of the winery as to the

(Testimony of Arthur F. Bulfinch.)

proof of the brandy in the tank prior to dilution from the overflow of water?

A. Mr. Renteria said in the presence of Mr. Groci that he had run the brandy [41] at 155 proof throughout the entire line, and that was the proof of the brandy before the overflow of water.

Q. Did you or did you not calculate the loss suffered by the winery by any sort of calculation?

A. The difference between the amount of brandy which was on hand before the loss was sustained and the quantity of brandy in both the brandy tank and in the sump would give the amount of the loss which had been sustained.

Q. What was the amount of the loss?

Mr. Fouke: I object to that as calling for the conclusion of the witness unless he states how the loss was sustained.

The Court: If he knows he may answer.

Mr. Guerard: Q. Did you calculate the loss?

A. I did.

Q. My question now is, the figure arrived at by reason of your process of calculation.

A. That was 1600 plus proof gallons.

Q. It was over 1600? A. Yes.

Q. Proof gallons?

A. Yes. 1619.56 proof gallons was the amount of loss that I determined at that time, and that is the same figure that was used.

Q. And it was upon those figures that you figured the amount to be charged the winery for tax purposes, is that correct?

(Testimony of Arthur F. Bulfinch.)

A. That is correct.

Q. Do you know whether or not the spirits that remained on hand were afterwards redistilled?

A. As far as I know they were. [42] Application was made to redistill them.

Q. You have no personal knowledge, but you do know an application was made to redistill?

A. Yes.

Q. You don't know whether they were, or not?

A. No.

Mr. Guerard: I think that is all right now.

Cross-Examination

Mr. Fouke: Q. Mr. Bulfinch, you stated that Mr. Renteria was an employee at the Livermore Winery. Will you tell us upon what basis that statement is made, as to how you know he was an employee?

A. On his own statement that he was the still operator.

Q. Made at what time and place?

A. Made on December 28th.

Q. Did he state that he was an employee of the Livermore Winery?

A. Not in so many words.

Q. Do you know whether he was an employee of some other party for whom spirits were being distilled under an arrangement or contract?

A. I have no knowledge of that.

Q. Would you say that he was not an employee of some concern at the time?

(Testimony of Arthur F. Bulfinch.)

A. There is no reason to think that he was.

Q. Do you know that he was not an employee of someone else at the time? A. No.

Q. You don't know whether he was an employee of the Livermore Winery at the time, of your own knowledge?

A. Merely from the statement he made.

Q. Of your own knowledge, will you just answer the question? [43]

A. There was apparent an employer and employee relation between Mr. Groci and him at the time they were together.

Mr. Fouke: I move that go out as not responsive.

The Court: Answer the question.

A. No, I don't.

Mr. Fouke: Q. You testified that you did not personally see this particular document, Form 15, but that the figures that are included there were furnished you and you observed them in writing, and they were furnished by Mr. Renteria, is that correct?

A. By Mr. Renteria or some other employee of the winery.

Q. Do you know what other employee it might have been? A. I don't know.

Q. Do you know whether it was some other employee?

A. These forms are generally kept in the office of the winery, and it would be necessary for the

(Testimony of Arthur F. Bulfinch.)

person to have access to that office to take that from the file and give it to me.

Q. But you personally saw these figures?

A. I saw the figures on the rough copy which is kept as a daily entry as required by the regulations.

Q. Do you know whether the rough entries were records of the Livermore Winery, or private records of an employee?

A. These are records of the Livermore Winery. As far as their preparation is concerned, they are required to keep that record and keep it accurately. They submit a transcript of [44] the record at the end of the month for Form 15, which you have there.

Q. Were they on any printed form of the Government? A. They are on Form 15.

Q. Now, that some eight years have passed you still know that the figures that were contained on this report to which you have testified were those indicated to you at the time of your December 28th visit. Now, I would like to have you tell me, if you can, what appears in that sixth column on page 3 of this Form 15—what quantity in gallons appears on line 3.

A. I compared the totals of the form as to calculated yield and the amount of the brandy gauged out with the figures that I had in my report and found them to be identical. That is why I can testify to the fact that those figures were the same as the figures that I took off the rough entries at the time of the visit to the winery.

(Testimony of Arthur F. Bulfinch.)

Q. When did you make that comparison?

A. I made that comparison a week ago in the office of Mr. Guerard.

Q. Did you make it from the original records that you originally said were submitted to you at the winery with this Form 15?

A. I made it from a copy of my report of inspection on which I had written down the figures that were on the original form.

Q. When did you make that report of yours, at what time? A. On December 30.

Q. Where did you make it?

A. In the office of the Alcohol Tax Unit. [45]

Q. And did you have at that time the copies of the Livermore Winery records or those of the employee where those figures were set forth?

A. I had my original notes on it.

Q. Do you have those original notes with you now? A. I have not.

Q. Then you don't know whether or not those are the identical figures or the correct figures or accurate figures, do you?

A. I believe them to be.

Q. But of your own knowledge you don't know?

A. I have not looked at——

Q. (Interrupting) Just answer my question.

A. No.

Q. You don't know, is that your answer?

A. That is right.

Q. Where we have totals on the bottom of this

(Testimony of Arthur F. Bulfinch.)

form which gives certain figures, can you give me those totals from memory at this time?

A. Not at this time.

Q. It would be necessary for you to refer to other documents or records in order to be able to state what those amounts were?

A. To give the exact amount it would be.

Q. That is equally true with respect to your other testimony earlier as to the statement on the reverse side of this report as to the summary of brandy disposed of or on hand?

A. That would be equally true of that.

Q. So you don't know, then, what amount was set forth in those figures?

A. I know the approximate figures within a few gallons.

Q. Then would you give me the amount that is listed under [46] paragraph No. 8, entitled, "Casualty," and tell me how many proof gallons is listed under that? This is Form 15 of December, 1936.

A. I believe that figure is 2973.80.

Q. The figure here is 2873.70. Do you know what the total of the whole group covering the summary of brandy produced, disposed of, and on hand is?

A. That figure is approximately 4500, I could not give it exactly.

Q. In other words, you don't know the exact amount.

A. I don't know the exact amount.

Q. So that it would be necessary for you to

(Testimony of Arthur F. Bulfinch.)

refer to other documents or records in order to testify specifically as to those figures?

A. It would.

Q. Calling your attention to Plaintiff's Exhibit 1-B, I ask you whether or not you can state from your knowledge and memory the number of gallons that are listed under paragraph 8, "Casualty," as to brandy, the summary of brandy produced, disposed of and on hand?

A. The total amount produced?

Q. Well, the first amount occasioned from casualty? A. What form?

Q. That is another copy of Form 15, Monthly Return of Fruit Distiller for December, 1936.

A. The amount shown as casualty in that form is 1,619.56 proof gallons.

Q. Can you state as to the quantity of brandy that was on hand as of the last of the month, paragraph No. 9, as to the number of gallons?

A. That was the figure that was recoverable, [47] 1200 plus proof gallons.

Q. The figures are different here. As to the quantity that was transferred to wineries under paragraph No. 7, do you know the number of gallons, can you testify to that?

A. 1602 and a small fraction.

Q. The figures are different here. Do you know of your own knowledge, Mr. Bulfinch, how much brandy was on hand at the Livermore Winery prior to December 26, 1936?

A. I cannot give you the exact figure on that.

(Testimony of Arthur F. Bulfinch.)

Q. You have testified here with regard to the fact that you made certain tests and gaugings and that the proof of the brandy that you tested and gauged ran at 55 proof. Are you positive or certain as to that amount? A. As to the proof?

Q. Yes, that you gauged on December 28, 1936.

A. I am certain that I gauged it. I would not say as to the exact proof.

The Court: He testified he believed it was.

A. I said that I believed it was 55 proof.

Mr. Fouke: Q. Isn't it a fact according to the records that you sent personally to the Internal Revenue Department that the proof of brandy contained in tank No. 2 was just 54 proof?

A. That might be.

Q. Isn't it a fact that you advised the Department, the Alcohol Tax Unit, that the proof of the brandy in tank No. 1 was 20 proof gallons?

Mr. Guerard: I object to the question because the best [48] evidence is the report.

Mr. Fouke: This is cross-examination and he has already testified as to the test he made and the fact that so far as those tests were concerned there was a certain proof. Now, I have information which indicates otherwise.

The Court: Have you a report?

Mr. Guerard: Yes, there is a report covering it.

The Court: Cross-examine him on that report and ask him if he made that report.

Mr. Fouke: Q. Did you make such a report to the Alcohol Tax Unit? A. Yes.

(Testimony of Arthur F. Bulfinch.)

Q. The proof of brandy varied in that test, depending upon where the material was tested and where it was located, is that not true?

A. Well, the bulk of it was in the brandy receiving tank No. 2, and that would be all the same proof, and then there was a small amount in that distilling material sump.

Q. How many sumps are there there?

A. I believe only one at that time.

Q. Only one sump?

A. Only one distilling material sump that I recall.

Q. Isn't it a fact that there were two concrete sumps at that time on the premises?

A. Not to my knowledge.

Q. Would you say that there was not sump No. 1 with a capacity of 225.10 gallons and sump No. 2 with a capacity of 422.59 [49] gallons on December 28, 1936?

A. I would not say that there were not two sumps.

Q. So there might have been?

A. There might have been two sumps, yes.

Q. When you made your tests did you make your test only of the receiving tanks 1 and 2 and of one of the two sumps? A. Yes.

Q. Did you make tests of any other material elsewhere in the premises, speaking of the distillery premises? A. No.

Q. In your observation of this still, was there one still on the premises at the time? or two stills?

(Testimony of Arthur F. Bulfinch.)

A. There was one still on the premises at that time.

Q. In the process of manufacture of distilled spirits would you please explain the process of manufacture, inasmuch as you have been permitted to testify as to the still and its operation.

A. How much do you want on that?

Q. I would like to have you state the manner in which the distilling material is received and the course.

A. The still material in the case of bonded winery No. 2 is received by pipe line and deposited in the stilling machinery. The distilling material then flows directly over into the tank or is pumped to a charging tank located high in the building, where it would flow by gravity into the still column entering through the upper portion of the still. The steam is applied to the bottom of the still, the vapors rise through the rectifying [50] column, that is above the point of entry of the still material, and go out through the top of the still; what is called the vapor pipe is about six inches or eight inches in diameter. This vapor pipe goes into the dephlegmator, which separates the low proof spirits with a comparatively low boiling point as compared with a high boiling point. These are returned to the still for further distillation. Then the vapors which have not been condensed by the dephlegmator flow into the condensor, where they are condensed and flow through the tribox. From the tribox—the tribox is located on the control floor of the dis-

(Testimony of Arthur F. Bulfinch.)

tillery—connected with that is a pipe by which the brandy may be turned over into a singling tank or into the brandy receiving tank.

Q. What is a singling tank?

A. The singling tank in most distilleries is a small tank in which they collect spirits that are below the proof intended to be stilled.

Q. Where was that singling tank located in the Livermore Winery, in the distillery?

A. I don't recall where that was located, now.

Q. Do you recall whether it was located at the top of the still, itself? A. It would be below.

Q. It would be below the still?

A. Below the top of the still.

Q. How far below the top of the still?

A. Ordinarily it is located just below the level of the tribox.

Q. As to the overflow tank, do you know where that is located? [51]

A. There is no overflow tank. The tribox is equipped so that the overflow will go over to a singling tank or to the brandy-receiving tanks, one of the brandy-receiving tanks.

Q. Then you do not recall in the Livermore Winery the presence of an overflow tank of 398.34 gallons capacity? A. I do not recall that.

Q. Do you recall another overflow tank, a puncheon made of oak wood of about 180 gallons capacity? A. No.

Q. If there were such a tank on the premises it would be a distilling material overflow tank, so that

(Testimony of Arthur F. Bulfinch.)

any distilling material would go into that tank and be retained until released from that tank?

A. I don't recall such a tank, at all. Ordinarily, the overflow from the discharge tank goes back into the stilling material, itself.

Q. Is there in addition to that a singling tank with a capacity of 104 gallons, known as singling tank No. 1? A. I believe there is.

Q. In your computation as to the quantity of distilled spirits that were allegedly lost on December 26th or December 27th, as to which you made a computation on December 28th, did you include in your computation any distilling material or any brandy that might have been contained in the overflow tank No. 1, having a capacity of 398.34 gallons, the so-called overflow tank having a capacity of 180 gallons and the singling tank having a capacity of 104 gallons?

A. The distilling material [52] tank would not be relevant because the amount of the loss was calculated on the quantity which the distilling records showed to be in the tank before the loss and the quantity which remained on hand in the tanks which were measured.

Mr. Fouke: I move that the answer be stricken out as not responsive to the question. I would like an answer to the question. I would like to have the question read.

(Question read by the reporter.)

A. No.

Q. Did you take into your consideration of any

(Testimony of Arthur F. Bulfinch.)

loss any distilled spirits on the floor of the distillery, as distinguished from the sump or the receiving tank?

A. There was no distilled spirits mixed with any substance in any recognizable quantity on the floor at the time of my visit, and there was none taken into consideration.

Q. Do you recall what kind of a floor there was in the distillery premises on December 28th when you visited the premises?

A. Well, there was a cement floor; a concrete floor around the sump.

Q. What kind of a floor was the floor of the distillery, if you know?

A. It was a concrete floor in and around the sump.

Q. Isn't it a fact that a portion of the distillery premises contained a ground floor, a dirt floor?

A. Yes.

Q. Did it? A. Part of it.

Q. Was that area damp at the time you were there on December [53] 28th?

A. As I recall, it was.

Q. Was there any observable distilled spirits or other material there when you were there on December 28th?

A. No measurable quantity of it. It was wet there from a quantity that had overflowed.

Q. Did you observe any distilled material outside of the still house or distillery premises on that day? A. There was some outside.

(Testimony of Arthur F. Bulfinch.)

Q. On December 8th?

A. A negligible quantity. There was wetness on the ground outside of the brandy-receiving tank or the room containing the brandy-receiving tank.

The Court: That would not go in the sump, then?

A. That would run out in the opposite direction.

Q. (By Mr. Fouke): Did you make a test to determine whether or not there was any brandy in that? A. No, I did not.

Q. Did anyone else, to your knowledge, make any test to determine if there was any brandy there? A. No.

Q. No test at all? A. No.

Q. So far as you know, the only tests you made were those of the sump which you believed to be but one sump, and two receiving tanks?

A. That was the only sump containing liquid. I made a check of that, and the two receiving tanks.

Q. But you have not any present recollection of a second sump, nor of the distilling material overflow tank, nor of the puncheon or the singling tank?

A. They were not pertinent to the loss. [54]

Q. I mean you made no check?

A. I made no check.

Q. You said that you were at the winery on December 28th. A. Yes.

Q. You are positive as to that date, are you?

A. I am.

Q. And not that it was on December 27th when you were there?

(Testimony of Arthur F. Bulfinch.)

A. December 27th was a Sunday and I was not there on that day.

Q. You said that you are positive that Mr. Groci was at the winery on December 28th. A. Yes.

Q. At what hour?

A. As I recall, it was shortly after noon when he came there.

Q. Shortly afternoon on December 28th?

A. Yes.

Q. You have indicated that Mr. Renteria was in charge of the still. If so, do you know during what hours he was there, of your own knowledge?

Mr. Guerard: What day?

Mr. Fouke: On December 26th, 1936.

A. He was there on that date—it would not be from my knowledge but from his statement.

Q. I say from your own knowledge.

A. I have no knowledge of the hours he was there.

Q. I repeat the same question as to December 27th. A. No knowledge.

Q. And as to December 28th I repeat the same question.

A. He was there to my own knowledge from about ten or ten thirty in the morning until sometime in the afternoon, when I left the premises. [55]

Q. Isn't it a fact that another individual by the name of Douglas Kennedy was in charge of the still up to four o'clock p. m. of each day, of your own knowledge? A. Not to my knowledge.

Q. Well, was he there?

(Testimony of Arthur F. Bulfinch.)

A. I don't recall his being there that day.

Q. You don't recall it?

A. I don't recall his being there on that day.

Q. Would you say he was not there?

A. No.

Q. Do you recall anyone else being present on December 28th?

A. Mr. Browning and Mr. Groci, and there undoubtedly were other employees around the premises, I didn't know by name at that time.

Q. Did you see any person turn on any faucet in the premises on either December 26th, 27th, or 28th, 1936? A. What premises?

Q. In the distillery premises.

A. In the distillery premises I couldn't recall seeing anyone do so.

Q. You were not personally present during such period of time as there might have been any flow of water or distilling material or brandy from the still into the receiving tank on either of those days, were you? A. No.

Q. So that the only information you have is what had been told you by others other than what you testified to of your own knowledge?

A. That is correct.

Q. Do you know how long the still was in operation, if at all, on December 26, 1936?

A. I have no idea of the time, at all, [56] except the closing-down time as it was given to me by Mr. Renteria.

Q. Do you know who was in charge of the still

(Testimony of Arthur F. Bulfinch.)

on that day, or what persons were in charge of the still on that day?

A. Renteria said that he had been in charge of it during the night shift. Whether that started at four o'clock I don't know.

Q. Did he state whether or not he was in charge of it during that morning shift, or up to four o'clock? A. No, he did not.

Q. Do you know whether anyone else was in charge up to that time? A. I do not.

Q. So that any statements that might have been made by Mr. Renteria were statements relating to the time when he was operating the still, as to how much may have been produced out of the distilling material? A. That is correct.

Q. So you have no personal knowledge of what quantity of distilling material was distilled during any other portion of the day? A. No.

Q. By any other person? A. No.

Q. Then how can you determine the quantity of proof gallons of brandy that was supposed to have been manufactured or produced there on December 26th?

A. I did not determine the amount that was produced on December 26th. My determination was made from finding out the amount of brandy that was on hand on December 26th, which was taken from the reading at the time [57] that Renteria discontinued distilling. The amount of brandy that was in there might have been distilled during any part of the month.

(Testimony of Arthur F. Bulfinch.)

Q. Any portion of the month? A. Yes.

Q. Then is it your testimony that any loss, if any, occurred on December 27, 1936?

A. Not necessarily. The loss that occurred was between the time he discontinued the distilling on the night of December 26th until the time that the loss was discovered and the water turned off on December 27th.

Q. But you have testified that Mr. Renteria, to your knowledge, was on the night shift from four to twelve, is that not correct?

Mr. Guerard: He has not testified to that, at all. He stated that is what Renteria said to him.

Mr. Fouke: Then I withdraw the question.

Q. You testified that Mr. Renteria told you he was on the night shift? A. Yes.

Q. What time was it customary to close down the night shift?

A. On Saturday night at 12 o'clock.

Q. Is that not the law, to your knowledge, in connection with your duties? A. Yes.

Q. It is mandatory that it be closed at twelve o'clock? A. Yes.

Q. On the night in question, prior to Sunday morning? A. Yes.

Q. Do you know the capacity of the still that was being used in [58] the distillery at that time?

A. I do not.

Q. Would you be able to state about how long it would take for a still of the size that was there

(Testimony of Arthur F. Bulfinch.)

to fill with water to a point where it might overflow from the tribox into the receiving tank?

Mr. Guerard: I object to the question as entirely speculative, what might happened.

The Court: Have you any knowledge on that?

A. That is an impossible question, because you have no idea how big the water line is you put on there, about how many gallons of water was flowing in.

Mr. Fouke: Q. Would you be able to make any statement at all as to how long it would take if there was a minimum supply of water inserted into the tank?

A. A minimum supply might be a drop at a time.

The Court: You are asking him about a minimum. What might happen on a minimum is very indefinite.

Mr. Fouke: I will withdraw the question and reverse it.

Q. Did you observe any hose on the premises on December 28th?

A. I don't recall that I did.

Q. Did you observe it on any other day that you were there?

A. I did not distinctly recall any hose—there was a hose that was used from time to time, I believe.

Q. What was the size of that hose?

A. Either inch and a half or two inch. That was in the winery. [59]

(Testimony of Arthur F. Bulfinch.)

Q. How long would it take, in your opinion, if a full force of water were permitted to flow into the still, itself, so as to cause the water to go in through the tribox of the still?

A. I have no definite knowledge on that, at all. It would be based entirely on the flow of water, the diameter of the still, the height of the entire column, the height of the feeder line, and there would be so many factors in there, I could not possibly answer the length of time.

Q. Do you know whether the still was operated or whether the still was closed down prior to twelve o'clock on December 26th?

A. From statements made it was closed down a very short time before that.

Q. Then in that short period of time would it have been possible for the tank, that is, the still, to have been filled with water so as to cause it to overflow into the tribox and receiving tank?

A. I don't know.

Q. You are qualified as an expert, apparently; what is your opinion on it?

A. I would believe it unlikely that it would fill up in that time.

Q. Then directing your attention to December 27, do you know what portion of the alleged loss was sustained on December 27, if any?

A. I would say most of it was sustained on that day.

Q. Was it sustained on any other day after that day? A. No, it was not.

(Testimony of Arthur F. Bulfinch.)

Q. Well, do you know?

A. The condition that caused the loss [60] had been stopped at something like 9:30 on Sunday morning; that would be the 27th, and there would be no reason for any loss after that hour.

Q. So far as you know, you don't know, do you?

A. I don't know.

Q. There might have been a loss on the morning of December 28th, before you got there, might there not?

Mr. Guerard: I object to the question as speculative.

Mr. Fouke: I withdraw the question.

Q. Then so far as you know any loss that was occasioned at all, if any, occurred prior to the time that you arrived there on December 28, 1936?

A. That is correct.

Q. Your figures were computed at or about what hour?

A. At or about noon I would say.

Q. At or about noon? A. Yes.

Q. That is of that day?

A. It might be just before the noon hour.

The Court: We will take a recess now until tomorrow morning.

(An adjournment was thereupon taken until tomorrow, Wednesday, December 20, 1944, at 10:00 o'clock a. m.) [61]

Wednesday, December 20, 1944

10:00 A. M.

ARTHUR F. BULFINCH,

recalled;

Cross-Examination

(Resumed)

Mr. Fouke: Q. Mr. Bulfinch, you have testified that you were familiar with the distillery premises of the Livermore Winery. Is that correct?

A. I do not think I said I was entirely familiar with the distilling premises. I was not familiar with the winery and distillery, and so far as I know that was no more than the second time I visited the premises.

Q. You testified with regard to the still, itself, and its operation, and what in your opinion could have occurred in connection with any loss that was sustained, is that not true?

A. That was based on a general knowledge of stills rather than a particular knowledge of the Livermore Winery still.

Q. Directing your attention to the distillery on the premises of the Livermore Winery, what is your present recollection as to whether or not there were other tanks than those to which you have testified and those to which your attention was called during the course of the cross-examination yesterday?

A. There were two distilling measuring tanks,

(Testimony of Arthur F. Bulfinch.)

large wooden tanks of some eight thousand gallons capacity.

Q. In connection with your tabulation or your computations to which you testified, did you measure the quantity of the distilling material in those tanks in arriving at your conclusion? [62]

A. Would it be permissible for me to correct something I said yesterday?

Q. First, let us get an answer to this question. If you can, answer the question, please.

A. There was no distilling material in the tanks; there was a mixture of brandy and water which had been in the sump or sumps, and on the floor of the distillery, which had been transferred to the distilling material tank No. 1 and was measured. At the time you asked me the question as to measuring the sumps, the number of sumps yesterday, you recall that you said that I reported measuring one sump, and I asked you if that was my report that you had and you said that I so reported in that report. On the basis of that statement I inadvertently made the statement that I measured it in the sump rather than in the distilling material tank No. 1, which is the statement which is made in my report.

Mr. Fouke: If your Honor please, in connection with that report I have a letter from Frank J. Hennessy, United States Attorney, quoting portions of the report by Mr. Bulfinch. Mr. Guerard, will you stipulate that this is a correct copy?

Mr. Guerard: I will stipulate that the portions

(Testimony of Arthur F. Bulfinch.)

of the report quoted in the letter from the United States Attorney, dated August 24, 1943, is from a report made by Mr. Bulfinch, dated December 30, 1936.

Mr. Fouke: Q. Now, then, again directing your attention to this report which is the basis of the question that I asked [63] you in what connection do you wish to vary your testimony or correct it?

A. On the statement that one sump was measured. This figure is the recovery from the sump and stored on the distilling material tank No. 1 and it was measured there.

Q. Did you obtain that material from more than one sump?

A. From one sump. There are two sumps separated by a concrete wall with an inter-connecting pipe-line. The only division between the two sumps is a concrete wall 46 inches, so that the material placed in the smaller sump, which is at a higher level than the other sump, will flow down so that there would be in effect one sump.

Q. Do you have those plans here?

A. I have not.

Q. Will you produce them?

A. I can produce them; they are at the office.

Q. Could they be brought over here?

A. I think some one could bring them over here.

Mr. Fouke: Might I call for a recess while they are brought over here?

Mr. Guerard: He is asking an employee for the Government if he can produce something that

(Testimony of Arthur F. Bulfinch.)

is not in his custody or control. I will state to your Honor I had the plans here yesterday, and as the case progressed I saw no need for the plans being used in the trial of this case, and I dismissed the witness, and along with his dismissal I told him to take the plans along with him, that I would not have any use for them. [64]

The Court: Proceed with this witness.

Mr. Fouke: Might I make a statement? The witness has just testified that he had seen the plans since the time he was here yesterday, and in connection with that I would like to verify the information from the plans, which are not in our possession. I would like to have those plans made available to which the witness has testified, in order that we might be able to either establish or contradict the information which he has just testified to.

The Court: There is nothing before the court. Proceed with this witness.

Mr. Fouke: Q. Now, in connection with the plan, I will ask you if you did not say there were two distilling material receiving tanks?

A. Distilling material measuring tanks.

Q. And as to those two tanks was the distilling material poured into those tanks and from there into the still in the process of distillation?

A. All the material entered into the still by pipe-line from the winery, and from there went into the sump.

Q. And in connection with the quantity in those

(Testimony of Arthur F. Bulfinch.)

tanks, were there gauges or measures on the tanks from which there could be ascertained the quantity of distilling material therein?

A. There was a gauge on each of the tanks.

Q. And in connection with those gauges it is possible to ascertain and determine the quantity of distilling material in the tanks at all times, isn't it? A. That is correct. [65]

Q. That was part of the records of the winery, indicating the quantity that was there?

A. They did not carry records indicating what was there. The records indicated what went into the tanks from the winery and was used for distillation.

Q. Did you, in arriving at your computation, measure the material in both tanks, or just one of the two distilling material tanks?

A. There was material only in one.

Q. Did you measure the other tank?

A. Yes.

Q. Did you make a gauge, yourself, of the other tanks? A. The tank was empty.

Q. The other tank was empty? A. Yes.

Q. Now, then, as to the removal of the distilled spirits from the winery premises, do you know the method of that removal and can you state it at this time?

A. At that time the winery had a fortifying room located on the other side of the road, and it was transferred by pipe-line into the fortifying room, and into the fortifying tank.

(Testimony of Arthur F. Bulfinch.)

Q. That was a separate room and establishment apart from the distillery?

A. It was part of the winery premises.

Q. But it was separate from the distillery, itself? A. Yes.

Q. And on the two receiving tanks for the brandy to which you testified as to the overflow, are there any locks or padlocks on those tanks?

A. The outlet valves were locked. The manhole at the top of the tank is locked with Government locks.

Q. In whose possession were the locks on this occasion? [66]

Mr. Guerard: If he knows.

Mr. Fouke: If you know.

A. They are in the possession of the gauger assigned to the plant. Mr. Browning was assigned, and I presume they were in his possession, but I could not say definitely.

Q. Are there any keys made available to the winery manager or distiller? A. No.

Q. The Government has all of the keys to the outlets to the tanks, is that right? A. Yes.

Q. Now, was there on the winery premises, if you know, a distillery warehouse?

A. They did have one, that was located just back of the fortifying room.

Q. And in the event any brandy was removed from the distillery to the warehouse it would have to be removed from the distillery, itself, and into the distillery warehouse?

(Testimony of Arthur F. Bulfinch.)

A. The distillery warehouse I think was part of the distillery premises, and it would be removed from the proof distillery to the Internal Revenue bonded warehouse.

Q. A separate premises under lock and key?

A. Yes.

Q. Under the care of a bonded storekeeper, a Government official?

A. The same gauger would look after that.

Q. You said you looked at these plans. Did you observe whether there was a faucet on the distilling material line connecting to the distillery?

A. I did not observe that.

Q. Did you observe whether there was a faucet on that particular [67] line?

A. I don't recall that it was shown on the plans.

Q. Isn't it a requirement, if you know, that in setting up a fruit distillery it is necessary and a prerequisite that the plans be approved by the Alcohol Tax Unit of the United States Government prior to authorizing one to engage in the distillery business? A. That is correct.

Q. And any variation in these plans and in the physical equipment must be approved by the official in charge of that branch of the Federal Government, is that not correct?

A. It should be approved by the gauger assigned to the plant.

Q. By the gauger assigned to the plant?

A. Yes.

(Testimony of Arthur F. Bulfinch.)

Q. Then new plans are prepared to cover those changes?

A. They are not prepared for minor changes.

Q. Do you know of your own knowledge whether there was ever approval sought and obtained for the installation of a faucet in the distilling material line? A. No, I do not.

Mr. Fouke: No further questions.

Redirect Examination

Mr. Guerard: Q. You testified that when you visited the plant on December 28th that you interviewed one Joe Renteria; is that correct?

A. Yes.

Q. Did he tell you the nature of his employment?

A. He said he was the night still operator.

Q. He said he was the night still operator?

A. Yes.

Q. On the same occasion you testified that you met Mr. Groci. [68] A. Yes.

Q. Did he state to you what his position was with the winery? A. He was vice-president.

Q. In one of the exhibits on file in the case Mr. G. B. Antonini signed certain papers as president in your presence, is that correct?

A. That is correct.

Q. What did he state with respect to his position with the winery?

A. At the office of Mayhew & Company he was introduced to me as the president of the company,

(Testimony of Arthur F. Bulfinch.)

and he signed the papers as president and swore to them.

Q. To your personal knowledge, you don't know the occupations of these various persons, do you?

A. No.

Q. You base your statement upon the claims made by those particular persons, do you?

A. Yes.

Mr. Fouke: I object to the questions as leading.

The Court: The objection will be sustained.

Mr. Guerard: Q. Upon what ground did you make the statement that Joe Renteria was night still operator and Mr. G. Groci was vice president, and Mr. G. B. Antonini was president of the Livermore Winery, Inc.?

Mr. Fouke: I object to that as calling for the conclusion of the witness.

The Court: He may answer.

A. The position of Joe Renteria was established to my satisfaction by his statement and by the statement of Mr. Browning, [69] who was the gauger at the premises, who said he had seen Mr. Renteria there for the period of his assignment. The position of Mr. Groci was based on his statement, and there was the further fact that I made an inspection of the bonded winery in February of 1936 and at that time Mr. Groci also said he was vice president, and Mr. Antonini, as I said, was introduced to me at the office of Mayhew & Company as the president of the winery and signed the document as president.

(Testimony of Arthur F. Bulfinch.)

Q. Now, in all of your investigations, whether based upon the information given to you by Mr. Antonini and Mr. Groci as to the amount on hand prior or up to midnight of December 26, you used, did you, the records in estimating the amount of the loss?

A. The amount of the actual loss on which the assessment was based was taken from the records of the still operator as to the amount that was on hand, less the amount which we found on hand at the time of the inspection. The other calculation as to the calculated yield from the distilling material and the amount removed, leaving the balance that should be on hand, was a figure that was arrived at by comparison in order to determine that the figures given to me were reasonable. The assessment is based on the amount that was shown on hand by the records at that time.

Q. That indicated a net loss of 1619.56 wine gallons as being taxable?

A. Proof gallons.

Q. Proof gallons as being taxable?

A. That is correct. [70]

Mr. Guerard: No further questions. If your Honor please, that completes the Government's case, with the exception that I have drawn a stipulation—I have not had a chance to read it, I dictated it this morning—with respect to the testimony of Mr. Browning. I was not able to get it yesterday on account of a matter that arose in my office and could not get any stenographic help until this morn-

ing. I now present it to you, Mr. Fouke, to see if we can agree upon it. I would state, if your Honor please, that it is based entirely upon information which Mr. Browning furnished some time ago, and every statement contained in this stipulation is in Mr. Fouke's possession.

Mr. Fouke: Of course, that is not a matter of record at the present time, and it is not admitted in evidence, that is just arguing the case.

Mr. Guerard: Might I suggest a recess in order to enable him to read this?

Mr. Fouke: We could not stipulate to this, because it states a lot of things that we, ourselves, do not know, and we question the accuracy of the statements made.

Mr. Guerard: I do not see how counsel can reach that conclusion, when he has not even read it.

Mr. Fouke: I have already read part of it.

Mr. Guerard: I suggest that the matter be left open, and I think the proof to be submitted by the defendant will fairly substantiate every statement that is made and included [71] in this stipulation.

The Court: He won't enter into the stipulation, so what is the next step?

Mr. Guerard: It puts us in an embarrassing position, because, as I explained to you yesterday, the witness, Mr. Browning, had a heart attack in my office and he is not available as a witness for the Government. As a matter of fact, the statements contained in this stipulation have already been testified to by Mr. Bulfinch, and this stipula-

tion is nothing more than a corroboration of the testimony which has already been given.

The Court: He won't enter into the stipulation. That is the answer to that.

Mr. Guerard: Of course, it is simply corroborative evidence.

Mr. Fouke: I have read enough of it now to say that I could not enter into this type of stipulation; if it is only corroborative evidence, which it does not appear to me to be, that is one thing. We can stipulate if Mr. Browning were here he would testify to the same effect in so far as he was present, as Mr. Bulfinch has testified.

Mr. Guerard: If the stipulation is to the effect that if Mr. Browning were present he would testify to the same facts that Mr. Bulfinch has testified to, that is satisfactory to me. [72]

Mr. Fouke: If Mr. Browning were present, but if he was not present at the time these statements are alleged to have been made then, of course, we would not consent to this stipulation.

Mr. Guerard: You will stipulate only to what occurred on December 28th?

Mr. Fouke: That is right.

Mr. Guerard: As shown by the testimony of Mr. Bulfinch?

Mr. Fouke: Yes.

Mr. Guerard: We agree to that stipulation, if your Honor please, and the plaintiff now rests.

Mr. Fouke: That is with the understanding that it is subject to any of our motions to strike; in other words——

Mr. Guerard: That is right.

Mr. Fouke: Now, if your Honor please, I would like at this time to make a motion for judgment in favor of the defendants. Before making that motion I would like to make a motion to strike out the following exhibits of the plaintiff for the reasons presented at the time that they were offered in evidence.

As to Plaintiff's Exhibit No. 1, that it does not appear thereon nor therefrom that the individual designated as G. B. Antonini was the president of the winery, namely, Livermore Winery, Inc., on that date, in that where the signature for president is supposed to have been indicated no signature appears at this particular point, and in verification it does [73] not indicate that Mr. Antonini signed it as President of the Livermore Winery, Inc., hence not binding upon that defendant, nor upon Saint Paul Mercury Indemnity Company. On the further ground there has been no foundation laid to establish that this was filed for or on behalf of the Livermore Winery, Inc. I think your Honor may want to rule on each one separately.

The Court: The motion will be denied at this time. All of these motions may be renewed after the submission of the case.

Mr. Fouke: Then there is no need of going on with a statement with regard to this.

The Court: No, just so you have your record.

Mr. Fouke: Then I would like at this time to renew my motion for judgment in favor of the defendants Saint Paul Mercury Indemnity Company

of Saint Paul, a Delaware corporation, and Livermore Winery, Inc., a California corporation, on the ground that plaintiff has failed to introduce evidence in accordance with or to prove the allegations contained in either the first or second cause of action to the extent that these allegations have been denied by those defendants.

In particular, I would like to call your Honor's attention to the fact that under paragraph 4 on page 2 of the complaint the then-existing statute is set forth covering the question as to the time for the payment of any tax which may have attached in connection with distilled spirits.

First, I might point out to your Honor that under the law [74] at the time of the manufacture of distilled spirits a tax attaches but does not become due or payable unless and until that particular material is either on the one hand assessed after having been gauged and proofed, and then, secondly, removed from the premises where the material was distilled.

As I pointed out, there was another remedy available to the plaintiff, if they had seen fit to have proceeded, namely, to have endeavored to ascertain and to have made an arbitrary assessment based upon the quantity of distilling material that might have been brought to the respective tanks and to the distillery premises, and then to have proceeded in order to effect the collection of the tax. The procedure that plaintiff has elected to follow is one of two alternatives. In this instance it is one where the spirits allegedly were removed to a

place that is not bonded. Had they been removed to the distillery warehouse that would have been a bonded warehouse and it would not have been necessary to pay the tax until the expiration of or on or about before eight years from that date.

Mr. Guerard: Might I make this interpolation? In the amended answer as filed, in paragraph 6 thereof, you admit the allegations of paragraph 4.

Mr. Fouke: I am not denying the allegation. As a matter of fact, I am relying upon that allegation and other allegations which were admitted as the basis for this motion for judgment in favor of the defendants. I quote from paragraph 4 of the [75] complaint, commencing with line 5, page 3. This is from section 1150, Title 26, United States Code, 1934 Edition:

"(b) Time for payment; bonded distilled spirits; distilled spirits not bonded. The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 1432, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, and returned to the Collector, who shall immediately demand payment of such tax and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law. Revised Statutes, section 3253."

Now, to proceed further, the allegation is made under paragraph 5, which has been denied as to the quantity of distilled spirits alleged to have been distilled in a particular month as to which your Honor heard the evidence and the testimony as to the failure to include in the computation in arriving at this figure distilling material in overflow tanks having a substantial number of gallons capacity in arriving at the calculation in question. It is our position that it was incumbent upon the Government to establish the fact, first, that a tax had assessed and to establish the method and the form of [76] arriving at that tax, and then a compliance with the regulations and rules and laws relative thereto as to the imposition and assessment of that tax and the efforts made in connection with the collection of that tax, all of which it is our position has not been set forth nor established so far as the testimony that has been introduced.

Then the more crucial point, if your Honor please, in paragraph 6 of the complaint. The complaint alleges without specifying the exact date that on December 26th and 27th the Livermore Winery removed from the premises the same quantity of the distilled spirits and that the tax thereon fixed by this section became due and payable, and mind you, not until there had been a removal from it, and then we hear testimony to the effect that there was no distilled spirits removed from the premises. As a matter of fact, this is the gist of their cause of action, that it had been removed, and

in the examination of the witnesses they have indicated, that is the one that testified, did not observe any removal of the distilled spirits, and that that which he gauged and checked on was only that within the distillery premises, itself. There is no evidence to support the allegation, in my opinion, here, and none that has been introduced so far as I could at this time recall indicating wherein any distilled spirits so alleged to have been removed in any quantity whatever has been removed from the premises. Moreover, the testimony was that so far [77] as the manufacture is concerned that probably there was no action on December 27th and as a matter of fact if the loss occurred by reason of the closing down of the still at or around 12 o'clock, that any loss would have been suffered on the 27th rather than on the 26th of December, 1936.

They have alleged in paragraph 7 that in compliance with law they levied and assessed against the defendant this tax, and yet we have no information, no evidence introduced indicating the method of procedure that has been followed. All that we have is an exhibit that was introduced to the effect that there was mailed to the Livermore Winery at Livermore, California, the notice and demand for tax, and also a notice and demand for a payment without any evidence it was mailed within the statutory period, the number of days that is required in connection with that notice; hence there has not been a compliance with the law in so far as that is concerned.

Then we have attached under that paragraph as an exhibit to the complaint an alleged notice which is admitted of May 25, 1939, making demand upon Livermore Winery and the Saint Paul Mercury Indemnity Company. That, incidentally, has been introduced in evidence here as Plaintiff's Exhibit No. 3, in which the same information appears. Hence, it is our contention that there was not a notice as required or any compliance with the law advising the Saint Paul Mercury Indemnity of the amount of its liability, if any, as surety under the bond which [78] was admitted, and consequently we believe that as a surety they are entitled to be notified as to what liability they might expect, and what, under those circumstances, they must meet and be able to establish, all of which was incumbent upon the plaintiff to establish.

We have denied both specifically and generally that there was any sum of money that was owing to the Government. And under the decision of United States v. Freeman, 157 Fed. 195, it has been held that it is sufficient defense on the part of the defendant to merely deny that they were not indebted in any sum whatever in connection with that which was sued upon, and that the Government has the burden of proof of establishing the tax, if any, and how it was arrived at.

Now, it is because of those facts we are asking that there be a judgment in favor of the defendants.

The Court: I am going to deny all of these motions at this time, with this thought in mind; you

may renew them at the close of the case, so that you do not lose any of your rights.

Mr. Guerard: Your Honor does not want me to go on with the argument of the case?

The Court: No.

Mr. Fouke: At this time I would like to call Mr. Antonini. [79]

G. B. ANTONINI,

called as a witness for defendants; sworn.

The Clerk: Q. Will you state your name to the court, please?

A. G. B. Antonini.

Mr. Fouke: Q. Where do you reside, Mr. Antonini?

A. 798 Green Street, San Francisco.

Q. Were you residing there on December 30, 1936? A. Yes.

Q. I hand you what purports to be a letter, referring to Plaintiff's Exhibit No. 4, purporting to bear your signature, dated December 30, 1936, and addressed to the District Supervisor, Internal Revenue Service, Alcohol Tax Unit, San Francisco, California, and ask you whether or not this is your signature, or a reproduction of your signature.

A. That is my signature.

Q. That is your signature? A. Yes.

Q. Will you tell me at what time and place your signature was affixed to the original of this document?

(Testimony of G. B. Antonini.)

A. I think it was in Mayhew's office.

Q. In whose office?

A. Mayhew's office.

Q. Where was that?

A. I don't know the number, it was on Market Street.

Q. In what city? A. San Francisco.

Q. Do you know who else was there on that occasion?

A. There was somebody else there, I don't recall now, I could not tell you who was there.

Q. Have you any recollection as to how many people were there? [80]

A. I know there were two or three parties there, I couldn't remember who it was. I know Mr. Mayhew was there.

Q. Do you recognize anybody in the courtroom as having been present on that occasion?

A. I don't know.

Q. Do you recall whether this gentleman—would you please stand up, Mr. Bulfinch—do you recall this gentleman being present on that occasion?

A. I may be mistaken, but I don't think I ever seen him; I don't remember ever seeing him before.

Mr. Guerard: Let the record show that the witness who stood up was Mr. Bulfinch, who has heretofore testified.

Mr. Fouke: Q. Now, then, directing your attention to the contents of this letter, which I would like to have you examine, were you on that date

(Testimony of G. B. Antonini.)

familiar with the facts that are set forth in that letter? A. I was not.

Q. Can you give any explanation as to this information and how it was placed in this document?

A. Well, I don't remember. I was in Mayhew's office and that was made up, on Market Street, but I was not familiar with that, because I was not on the premises, I didn't know anything about it.

Q. You say you were not on the premises. Were you engaged in other business? A. Yes.

Q. What business were you engaged in on December 26, 1936, other than President of the Livermore Winery?

A. You mean outside of that?

Q. Yes.

A. I was in the garage business. [81]

Q. How much of your time was devoted to each business?

A. Well, I would go from one place to the other.

Q. About what proportion, 50 per cent in each, or 10 per cent in one place, or 20 per cent?

A. I would put in some time in one place and some time in the other.

Q. Where did you put in your time as to the Livermore Winery?

A. Well, in the San Francisco office.

Q. Where was the office of the Livermore Winery at that time?

A. Broadway Street between Kearny and Montgomery.

(Testimony of G. B. Antonini.)

Q. It was not located on another street on that occasion, on Clay and Fillmore?

A. Well, I was not connected with the firm at that time, at all.

Q. So that on December 30, 1936, the office of the Livermore Winery was on Broadway?

A. Broadway.

Q. On Broadway Street in San Francisco?

A. Yes.

Q. It was not at the corner of Clay and Fillmore?

A. No, I don't know anything about that, because I was not connected with it then.

Q. In connection with your duties with the Livermore Winery, were they in San Francisco or elsewhere?

A. When I was connected with the Livermore Winery I was in San Francisco; the winery was in Livermore. The main office was in San Francisco.

Q. What particular duties with respect to the Livermore Winery did you handle and where?

A. San Francisco.

Q. What did you do?

A. I signed different papers for the [82] corporation.

Q. On December 26, 1936, were you in Livermore, California? A. No.

Q. Were you in Livermore on December 27, 1936? A. No.

Q. Or December 28, 1936?

A. I don't think so.

(Testimony of G. B. Antonini.)

Q. Or December 29, 1936?

A. No, I was not there at that time, at all. I know I was not there those days. It is so long ago I don't remember what days I was there, but I know I was not there those days, I was in the City.

Q. You knew you were in the City?

A. I was in the City.

Q. According to this letter it says, "At 11:50 p.m. Saturday, December 26, 1936, the distiller, Joe Renteria, attached a warehouse hose to valve into the distilling material pipe-line leading to top tank and turned on water, the purpose being to flush out pipes and column through the slop line. The distiller neglected to open the valve, and if such had been done the water would have passed through the still discharging through slop line. The water was turned off by an employee at the plant at 9:15 a.m. Sunday morning, December 27, 1936. It was then discovered that the oversight on the part of the distiller in not opening the slop line valve caused the water to run through the still and overflow brandy receiving tank No. 2, which was in use at that time, and which held approximately 1854 gallons of brandy at 155 proof, or 2673.70 proof gallons. Receiving tank No. 1 was not in use and was found [83] half full of water."

Did you make that statement on that occasion?

A. I made no statement of that at all because I didn't know. I must have got that in Mayhew's office from some person, I don't know who it was.

(Testimony of G. B. Antonini.)

We had some discussion there, and then Mr. Mayhew gave me something to sign.

Q. Do you know Joe Renteria?

A. I may have known him at that time because he was up there, but if I saw him now I don't think I would recognize him.

Q. Did you have any discussion with Joe Renteria between December 26 and December 30, 1936?

A. I didn't see him at that time, I never seen him.

Q. Did you have any discussion with him?

A. No.

Q. You never talked with him?

A. Never talked with him.

Q. Then you don't know of your own knowledge that these statements are true as to what the distiller Joe Renteria may have done on that particular day, December 26, 1936, do you?

A. No, I don't know anything about it.

Q. Nor do you know whether he attached a warehouse hose to the valve into the distilling material pipe line leading to top tank and turned on the water? A. No.

Q. Nor for what purpose that was done, it was intended for?

A. I don't know. I am not familiar with the situation, at all.

Q. You are not familiar with the situation, at all? A. No.

Q. Then you don't know whether the distiller neglected to open [84] the valve and if such had

(Testimony of G. B. Antonini.)

been done the water would have passed through the still discharging through slop line?

A. I didn't know anything about it.

Q. Nor do you know whether the water was turned off by an employee at the plant at 9:15 a. m. Sunday morning, December 27, 1936, of your own knowledge? A. No.

Q. Nor, as it is stated there, it was then discovered that the oversight on the part of the distiller in not opening the slop line valve caused the water to run through the still and overflow brandy receiving tank No. 27?

A. I don't know anything about it.

Q. Do you know where this information was obtained from?

A. Well, just as I say, I must have got that information in Mayhew's office.

Q. Did you have any information before you came to Mr. Mayhew's office on this day?

A. I heard that something was happening in the winery from Mr. Groci, but I don't know anything about it, because I was not there.

Q. Then did you write this letter, yourself?

A. No.

Q. Was it written by you or your dictation—did you dictate it to anyone? A. No.

Q. Did you authorize anybody to dictate it for you in this form? A. I did not.

Q. When did you first see this letter?

A. I see that letter now, but as I say, if I signed it I must have signed it at that [95] time, and if I

(Testimony of G. B. Antonini.)

signed it at that time I signed it on the advice of Mr. Mayhew; it was probably told me to sign it.

D. Do you know whether Mr. Mayhew was present on that occasion? Was he or not?

A. I think he was.

Q. You said there were two or three people there.

A. There were other people there besides Mayhew and I, but I don't know who they were.

D. Do you recall at this time who handed this letter to you?

A. I don't know, it is so long ago I couldn't remember.

Q. But you do recall that it was prepared and handed to you?

A. It was prepared and handed to me; there was some discussion and then Mr. Mayhew advised me to sign it.

Q. Were any of these statements made by any of the gentlemen present other than Mr. Mayhew, if he was present?

A. Well, as I say, somebody besides Mr. Mayhew was there, but I don't know who it was, I couldn't remember who it was.

Q. Do you recall whether it was any officer of the United States Government?

A. Well, I guess it was some agent or some inspector, or somebody, but I don't remember the name; I don't remember who it was because it was too long ago; there must have been somebody there.

(Testimony of G. B. Antonini.)

Q. Do you know whether that representative made this statement to you at that time?

A. I don't remember, it is impossible for me to remember, it was a long time ago and I don't remember.

Q. Do you recall having signed the original of this exhibit in [86] the presence of A. F. Bulfinch on the 30th of December, 1936?

A. Well, I don't remember, I couldn't say. Maybe I did, maybe not; I don't remember; I couldn't say one way or the other.

Q. Do you recall having been sworn and subscribing to this statement on that occasion?

A. Maybe I did and maybe not. I don't think I did. I don't think I would swear to anything. It is my recollection that I did not swear to anything, but still I could make a mistake. It is too long ago for me to remember, but I would say no.

Q. As to the rest of the information in here, this was all prepared and put in here and you had no knowledge of it at that time?

A. That is right.

Mr. Guerard: Don't lead the witness.

The Court: He does not remember anything about it, that is the substance of it.

Mr. Fouke: He did testify that he personally did not write it and it was not written at his direction, and he does recall that there was someone present.

The Court: Do you remember who was present?

(Testimony of G. B. Antonini.)

A. There was somebody there, but I couldn't say who it was, it is too long ago, I don't remember.

Mr. Fouke: Q. Your testimony is you did not dictate it, and you did not authorize it?

A. I had nothing to do with the writing or dictation.

Q. You signed it because you were told to sign it? [87]

A. I was pretty close to Mr. Mayhew and he advised me to sign it.

Cross-Examination

Mr. Guerard: Q. Mr. Antonini, there is no question but what you signed this paper that has just been exhibited to you?

A. That I signed it, yes.

Q. You admit you signed it?

A. That is my signature.

Q. You admit that you signed it in your official capacity as president of the Livermore Winery, Inc., did you not?

A. Well, I signed as president at that time, yes.

Q. You were president? A. Yes.

Q. You admit that you signed it in your official capacity, do you not? A. Yes.

Q. You were the president? A. Yes.

Q. But as I understand the substance of your testimony it is that while you signed it, and you admit signing it, you did not actually see the typing of the letter?

A. That is the letter, no.

Q. You don't know who typed it? A. No.

(Testimony of G. B. Antonini.)

Q. You don't know who was present except possibly Mr. Mayhew, is that correct?

A. I saw Mr. Mayhew there.

Q. Mayhew was there? A. Yes.

Q. Tell the Court who Mr. Mayhew was.

A. He had an office where they make the reports for the Government for the winery.

The Court: Is he a Government officer?

A. No, he is not a Government officer. He is a man in business and they charge [88] so much a month to make out the reports.

Mr. Guerard: Q. In other words, he was working under your direction, was he, a servant of the corporation?

Mr. Fouke: I object to that on the ground that the question has already been asked and answered, and he said he was in business and charged so much.

Mr. Guerard: This is cross-examination.

Mr. Fouke: But I am making that objection.

Mr. Guerard: Q. Mr. Mayhew was paid by the winery for the services which he performed?

A. Yes, any winery that he takes care of those things, make a report or anything like that, they certainly have to be compensated.

Q. And he was present when this data was accumulated and dictated to someone and later signed by you, isn't that a fact?

A. I don't know who dictated it, I signed it, because my signature is there. I know that, but I don't know who dictated the letter, I don't know that.

Q. Mr. Antonini, is it customary for you as

(Testimony of G. B. Antonini.)

president of this corporation to sign papers and swear to them and not know the truth of the contents of the documents which you signed?

A. Well, I suppose it was read to me, and I knew what I was signing, because I read the document there; we had a little discussion and then Mr. Mayhew told me to sign it.

Q. You believed it to be true when you signed it, didn't you?

A. Well, that was the information they gave me, but I wasn't [89] there to know it was true or not.

Q. But upon that information you believed it to be true?

A. I took it for granted. I suppose I was advised by Mr. Mayhew to sign it and I signed it.

Q. Even today you admit that it is true, don't you?

A. I don't know if it was true or not; I was not there to certify it was true; it was represented to me that way, but I don't know if it is true, or not.

Q. You don't know whether it is true, or not?

A. I don't know, no.

Q. But you signed it? A. I did sign it.

Q. Now, you say you were not at the plant on December 26th, 27th, 28th, 29th, and 30th of December, 1936. Is that correct? You were not at Livermore, were you? A. No, I was not there.

Q. That is your testimony?

A. That is my recollection.

Q. Where were you on December 22, 1936?

(Testimony of G. B. Antonini.)

A. I don't remember.

Q. Where were you on January 1, 1937?

A. Well, you ask me something I couldn't answer.

Q. In other words, you are simply guessing that you were not there on December 26th?

A. I am pretty sure I was not; that was after Christmas and I was at home. I would go up to Livermore once in a while, I couldn't say I was just there a certain day, because I don't know the day. I used to go there, I used to go several times, and I couldn't tell you the day I was there.

Q. It is your testimony that the office of the winery in [90] December, 1936, was on Broadway Street in San Francisco? A. Yes.

Q. Didn't the winery have some sort of an office where records are kept at Livermore also?

A. Well, there was bookkeeping in the winery and there was also bookkeeping in the office. What do you mean, what kind of records do you mean?

Q. Well, is it true that all the records pertaining to manufacture of brandy or distilled spirits, or whatever you were making out at Livermore was kept at Livermore and not at the Broadway address that you have just stated?

A. I think they were compelled by the Government to keep them at the winery.

Q. I think that answers the question. They were kept out there? A. Yes.

Q. In the office in San Francisco what records would you keep there, if any?

(Testimony of G. B. Antonini.)

A. Well, we had the seal, and also the collections, and things like that. That is what I call the office.

Q. Did you ever talk to Mr. Renteria about this matter? A. I did not talk to him.

Q. You never have?

A. I don't think I talked to him. Maybe I talked a little to him if I saw him when I came up to the winery. I don't remember if I did.

Q. You did not talk to him yesterday?

A. I was not here yesterday; I did not see him yesterday.

Q. You were not here yesterday? A. No.

Mr. Guerard: Mr. Renteria, will you please stand up? Is Mr. Renteria in court? (No response.)

Q. Was Mr. Groci the vice-president of your winery? A. Yes.

Q. What were his duties?

A. He was out at the winery at Livermore, in charge of the winery.

Q. He had charge of the winery?

A. He took care of the winery.

Q. In other words, he was in charge of the manufacture, is that right?

A. I don't know what he was in charge of. I know he took care of the winery. That is all I know; what department he was in charge of I couldn't tell you.

Q. The Livermore Winery, Inc. is a corporation, is it not? A. Yes.

(Testimony of G. B. Antonini.)

Q. You were duly elected president of that corporation? A. Yes.

Q. And Mr. Groci was duly elected vice-president? A. At that time, yes.

Q. You both held those positions on December 26, 27, and 28, 1936, is that correct? A. Yes.

Q. As I understand it, in order to be as brief as possible, this exhibit No. 4 which has been shown to you, I think you have admitted signing that in your official capacity, is that correct? A. Yes.

Q. And it bears the official seal of the corporation, does it not?

A. I don't see any seal of the corporation there.

Q. I will show you Exhibit No. 4, which you have heretofore seen, and call your attention to the seal appearing on the second page thereof, and ask you if that is the seal of the corporation. [92]

A. Oh, yes, I didn't see it, that is right, that is the seal of the corporation.

Q. That is the seal of the corporation?

A. Yes.

Q. That seal was in your office, was it not?

A. In Mr. Mayhew's office.

Q. He was your agent, is that right?

A. Well, he was employed by the winery.

The Court: Is that all from this witness?

Mr. Guerard: That is all.

Redirect Examination

Mr. Fouke: Just one question on that seal. Was this seal affixed in your presence?

(Testimony of G. B. Antonini.)

A. I couldn't remember if that was done. Mr. Mayhew put the seal of the corporation on these papers; I couldn't say if he did it when I was there or when I was not there, I don't remember.

Q. Was Mr. Mayhew on the salary roll as an employee of the Livermore Winery on that day, or did you hire him for different jobs from time to time and pay him for his services?

A. No, I think we used to give him so much a month; he used to charge very little.

Q. Was he an employee of yours, or merely hired to render independent service to the corporation?

Mr. Guerard: I object to the question.

Mr. Fouke: I will reframe the question. Q. Was Mr. Mayhew engaged in business on Market street under [93] his own name on December 30, 1936? A. He was.

Q. Was he handling various accounts for different concerns, do you know?

A. That was his general business, to do that.

Q. And the account of the Livermore Winery was one of the many that he was handling on that occasion, is that right?

A. I presume so, because I know that was his business, doing work for different wineries.

Q. Did you have control over his method of corporations or his business, or where he did business? A. No.

Mr. Fouke: That is all. I would like to call Mr. Maloni.

JOHN MALONI,

called for the defendant; sworn.

The Clerk: Will you state your name to the Court? A. John Maloni.

Mr. Fouke: Q. Mr. Maloni, where do you reside, where do you live? A. Livermore.

Q. Where were you living on December 27, 1936?

A. Livermore.

Q. On Sunday morning, December 27, 1936, at or about the hour of nine o'clock a.m. where were you, if you know? A. I was in the winery.

Q. What winery? A. Livermore Winery.

Q. Located where? A. West Third Street.

Q. In what city? A. Livermore.

Q. On that occasion what was the reason for your presence there, [94] if any? Why were you there? A. I was there to feed the dogs.

Q. Had you been there prior to that time on that day, or did you go there before, or at or about that time? A. I go there about that time.

Q. Where did you go on the premises of the Livermore Winery at about that time?

A. I went into the workshop to get the feed for the dogs.

Q. In what shop? A. The work shop.

Q. Where is that located in connection with the distillery in the premises of the Livermore Winery?

A. It is close to the distillery.

Q. Is it in the same building?

A. The same building.

(Testimony of John Maloni.)

Q. On that occasion were you employed by the Livermore Winery? A. Yes.

Q. How long had you been working for that concern? A. Since about November, 1933.

Q. 1933? A. Yes.

Q. Were you working for the Livermore Winery on December 27, 1933? A. Yes.

Q. Had you been working for them before that date? A. Yes.

Q. Had you been requested by anyone to go to the winery to feed the dogs on that day?

A. Yes.

Q. At that time what, if anything, did you observe in the distillery premises where you went on that occasion?

A. I went inside of the workshop to get feed for the dogs and saw brandy [95] running over the top of the tank.

Q. It was running over? A. Yes.

Q. Was it running over at the time you observed it? A. Yes.

Q. Did you observe brandy at any other place than running out of the tank?

A. I saw it on the floor.

Q. As to the floor, if you know, what kind of a floor is there in the distillery premises?

A. A concrete floor.

Q. In the entire premises?

A. Part dirt floor.

Q. Did you observe any brandy on the concrete floor? A. Yes.

(Testimony of John Maloni.)

Q. Did you observe any brandy on the dirt floor?

A. I don't remember seeing any on the dirt floor.

Q. Did you observe whether the floor was damp?

A. I don't remember.

Q. Did you see any brandy outside the distillery premises? A. Yes.

Q. Did you see any? A. Yes, on the floor.

Q. In the distillery premises?

A. In the distillery premises.

Q. Now, then, what did you do? Did you observe what was causing the brandy to flow over the tank? A. No.

Q. What did you do at that time, if anything?

A. I ran down to call Mr. Kennedy and let him know about it, because it was running on the floor.

Q. Was that Douglas Kennedy?

A. Douglas Kennedy.

Q. How far away from the winery did he live?

A. About three blocks. [96]

Q. Did you ask him to come to the winery?

A. Yes.

Q. Did he come with you? A. Yes.

Q. About what time did you get back to the winery?

A. About 9:15, fifteen minutes after nine.

Q. Did you observe what, if anything, Mr. Kennedy did?

A. I don't know exactly what he had been doing.

Q. After Mr. Kennedy got there did the brandy continue to run over the tank?

A. No, it stopped running right away.

(Testimony of John Maloni.)

Q. What, if anything, did Mr. Kennedy do, if you know? A. Well—

Q. (Interrupting): If you know, if you saw.

A. I couldn't exactly remember what he did.

Q. Did you see him do anything?

A. No, because he was ahead of me on the steps to go up in the still; I don't know exactly what he did.

Q. You did not go back in the still room again, into the distillery room?

A. Yes, I have been there.

Q. I mean on that day.

A. He went ahead of me, I called him from his home.

Q. How long did you remain on those winery premises on that day?

A. I don't exactly remember, I think I left about something about ten o'clock.

Q. About ten o'clock?

A. Something like that.

Q. Before you left, did anyone else arrive at the premises? A. I don't remember. [97]

Q. That you saw? Did you see anybody else come there? A. No.

Q. Was Mr. Kennedy still there when you left?

A. Yes.

Q. Did you see anyone else in the premises before you left there? A. No.

Q. You left about ten o'clock?

A. Something like that.

Q. And didn't return until when?

(Testimony of John Maloni.)

A. The next day.

Q. The next day? A. The next morning.

Q. The next morning did you see anybody at the premises?

A. Well, Kennedy was there, but I don't remember who else was there any more.

Q. Was there any officer of the corporation there?

Mr. Guerard: I object to the question as leading. A. I don't remember.

The Court: He don't remember.

Mr. Fouke: Q. Would you say that there were any other people there?

A. I think there were some working men around there, but I don't remember who was there.

Q. You don't recall anybody else being there?

A. No.

Q. What time did you get there the next morning? A. At eight o'clock.

Q. That was December 27? A. Yes.

Q. What time was it that you left, if you remember? A. That is December 27?

Q. December 27.

A. I think it was a day after the 27th.

Q. You were not there after ten o'clock on December 27th? [98]

A. I was there at nine o'clock on that day.

Q. On the 27th? A. Yes.

Q. And on the 28th you came there and you did not see anybody around the place except workmen? A. I don't remember that.

(Testimony of John Maloni.)

Q. What did you say?

The Court: He said he doesn't remember.

Mr. Fouke: You don't remember seeing anybody there?

A. I don't know who was there or if there was anyone there.

The Court: Is that all from this witness?

Mr. Fouke: Yes.

Cross-Examination

Mr. Guerard: Q. Are you still employed at the winery. A. Not now.

Q. But you were working there in December of 1936, and particularly on December 26, 27, and 28, is that right? A. Yes.

Q. On the morning of December 26th you simply went to the distillery for the purpose of feeding the dogs, is that correct? A. The 26th.

Q. Yes—no, the 27th.

A. That was on the 27th.

Q. On the 27th you were simply there for the purpose of feeding the dogs? A. Yes.

Q. While you were there you noticed tank No. 2 was overflowing?

Mr. Fouke: He did not say tank No. 2.

A. I don't know which tank.

Mr. Guerard: Q. There was a tank overflowing? [99]

A. There was a tank overflowing.

Q. You don't know which tank it was?

A. I don't remember which tank it was.

(Testimony of John Maloni.)

Q. But you remember that some tank was overflowing? A. Yes.

Q. You remember that there was also a concrete floor there? A. Yes.

Q. And that some brandy or some distilled spirits of some sort was on the concrete part of the premises? A. Yes.

Q. But there was none that you saw on the dirt?

A. I don't remember.

Q. Do you know what was done with the spirits or whatever might have been on the concrete part of the distillery?

A. I couldn't answer that question, I don't understand.

Q. You didn't sweep it out into the sump, did you? A. No.

Q. In other words, you did not do any work there at all other than to perform this chore of feeding the dogs? A. No.

Q. Then when you discovered that you notified Mr. Kennedy? A. Yes.

Q. And Mr. Kennedy's job was what?

A. Well, he came out and took care of that.

Q. What was his job?

A. He was in charge.

Q. He was in charge there, was he?

A. I don't know about that, but he used to run the still in the day time.

Q. He was distiller in the daytime?

A. Yes.

(Testimony of John Maloni.)

Q. Then you went to his house about three blocks away? A. Yes. [100]

Q. And came back to the distillery with him?

A. Yes.

Q. That is about all you really know about it?

A. Yes.

Mr. Guerard: That is all.

GUIDO GRANUCCI,

called as a witness for the defendant; sworn.

The Clerk: Will you state your name to the court? A. Guido Granucci.

Mr. Fouke: Q. On December 26th, 27th, 28th, 29th, and 30th, 1936, where did you reside?

A. 1466 Chester Street, Livermore.

Q. Were you employed at that time?

A. Yes.

Q. By whom were you employed?

A. Livermore Winery, Inc.

Q. What were your duties?

A. Well, taking care of the details of the work around the winery.

The Court: Manager? A. No.

Q. Superintendent?

A. No, just working in the office.

Q. What were your duties?

A. Well, taking care of the Government records, and orders from San Francisco, taking care of the Government stamps.

(Testimony of Guido Granucci.)

Mr. Fouke: Q. Now, on December 26, 1936, do you know whether John Maloni was employed by the Livermore Winery? A. He was.

Q. Do you know what his duties were there?

A. He was doing general work in the winery.

Q. In the winery? A. Yes. [101]

Q. Did your duties in the winery include the distilling?

A. No, the distilling was taken care of by day by Douglas Kennedy and Joseph Renteria at night.

Q. Do you know who the distiller was for the Livermore Winery on the day shift on December 26, 1936?

A. Douglas Kennedy should have been.

Q. Do you know whether he was?

A. Well, I was not there at the time; that was his regular shift.

Q. In other words, were you at the winery premises on December 26, 1936, to December 30, inclusive?

A. No, I was in Livermore, but I was not there at that time.

Q. You were not there at that time?

A. No.

Q. Are you connected with the Livermore Winery at the present time? A. Yes.

Q. What is your position with the winery?

A. Secretary.

Q. Secretary of the corporation?

A. Yes.

(Testimony of Guido Granucci.)

Q. Are you familiar with the premises of the Livermore Winery? A. I am.

Q. Were you familiar with the premises on the date that I mentioned, at or about that time?

A. Yes.

Q. Will you state the number of tanks, if any, located in the distilling premises of the winery at that time?

A. There were two distilling material tanks and two brandy-receiving tanks.

Mr. Guerard: How many tanks in all?

A. Four tanks, then [102] we had the singling tank, the charging tank, and an overflow tank.

The Court: How many, in all, at that time?

A. There were seven at that time, approximately.

Mr. Fouke: Q. Do you know approximately the capacity of those sump tanks 1 and 2?

A. Well, there was one approximately 200 gallons, and one approximately 400 gallons, as I recall.

Q. You testified there were seven tanks. Was one of those tanks what you call a singling tank?

A. The singling tank holds about 150 gallons.

Q. Where is that located in the premises?

A. Below the tribox.

Q. Is there a distilling material overflow tank?

A. Yes.

Q. Do you know about how many gallons capacity that had?

A. That would hold approximately 180 gallons.

(Testimony of Guido Granucci.)

Q. Is there another overflow tank of about 398 or 400 gallons adjacent to the sump for distilling material, just above the sump, to the side?

A. No, there is a receiving tank.

Q. How many gallons was that?

A. They held approximately 5000 gallons apiece, I think.

Q. They are likewise brandy tanks, are they not?

A. Brandy receiving tanks.

Q. What is the capacity of those, if you know?

A. As I recall about 3000, one of them, and about 2200.

Q. What do you call the tank which is just above the tank under the still?

A. Singling tank. [103]

Q. That is a singling tank? A. Yes.

Q. Then there was a distilling material tank below the singling tank. About what capacity was that?

A. That was around three or four hundred gallons.

Q. Now, as to the condition of the premises, do you know what kind of a floor there was there?

A. Well, for the brandy receiving tank we had concrete, and in the distillery we had concrete, and in the workshop, which was right next to the distillery, it was just plain dirt.

Q. Have you seen the plans of the winery, that is, of the distillery—have you seen those in the course of your activities in connection with the winery at any time? A. Oh, yes, I have.

(Testimony of Guido Granucci.)

Q. And the area you refer to is within the area of the distillery on those plans? A. Yes.

Q. Are you familiar with the operation of the still? A. Not very much.

The Court: He is an office man.

Mr. Fouke: Q. Have you worked around the still at any time?

A. No. I would not know how to run it.

Q. Did you ever go in the distillery, itself, in connection with your duties, to get any records or anything?

A. Yes, in making out the reports I would go in and ascertain how much distilling material they had, what percentage and how much there was in the tanks.

Q. Are you familiar with the general plan of the winery and [104] the buildings in the winery premises? A. Yes, I think so.

Q. As they were at that time? A. Yes.

Q. What building is adjacent to the distillery to the northeast of the winery, do you know?

A. There is storage there and also a shipping platform.

Q. By shipping platform what do you mean?

A. Well, at that time we shipped quite a bit of wine in barrels, and we had a spur track running back of the winery, and the barrels were on the platform and loaded onto the cars.

Q. That was to the north, was it, or northeast?

A. Northeast.

(Testimony of Guido Granucci.)

Q. Then at the easterly portion of the building what was there?

A. We had a concrete bonded warehouse for storage of brandy.

Q. For storage of what?

A. Of brandy, commercial brandy. Part of the room was partitioned off and we used that for a fortification room.

Q. Was there any connection between that place or any means of communication and the distillery?

A. Yes, there was a pipeline going from the distillery to the fortifying room.

Q. Was that fortified brandy brought from the distillery premises over to the bonded warehouse you have just testified to?

A. The brandy was taken into the bonded warehouse, it was first gauged in the brandy-receiving room that we had there where we had barrels and they were filled with brandy and after they were gauged they were stored in the warehouse.

Q. They were taken to the warehouse, but as to the fortification [105] room there was a pipeline?

A. Yes.

Q. Was that connected with the receiving tank?

A. No.

Q. Did you have any keys to that tank?

A. No, the Government gauger had the key for that.

Q. Were there any other locks on any of the other tanks in the distillery premises?

A. All of the tanks in the distillery premises

(Testimony of Guido Granucci.)

having brandy were all locked by Government locks or Government seal.

Q. Neither you nor any other officer of the corporation had a key, did you? A. No.

Q. In order to remove any brandy out of the receiving tanks in the distillery premises what was it necessary to do or what was done?

A. Well, there had to be a Government gauger present.

Q. What did he do?

A. He opened up the valves.

Q. Did he do anything before he opened the valves as to the brandy in the receiving tanks?

A. If commercial brandy was being made they stirred it up and they had to cut it down to a certain proof.

Q. Bring it down to a certain proof, that was done before the locks were fastened by the gauger with the key that he had? A. Yes.

Q. Before any process of removal of any material from the brandy-receiving tank commenced, is that not true? A. Yes.

Q. Now, these brandy-receiving tanks, are they connected in [106] any way with the still?

A. They are connected, they have a pipe going to them, which was sealed.

Q. Are there any locks connected with that?

A. There is a lock on the manhole of the tank, and there is a lock at the valve bottom of each tank, and a seal.

Q. All of those must be opened or removed by

(Testimony of Guido Granucci.)

the Government gauger in order to permit any material to go out? A. That is right.

Q. Now, as to the distilling material that was used in fortification, you said that it went through the pipe from the receiving tank after the pipes were opened or valves were opened by the gauger and the locks removed? A. Yes.

Q. You said that there is a fortification room and a tank to which a pipe is connected that leads to the distillery? A. Yes.

Q. And for that material to go over to the fortification room locks and valves are opened by the Government gauger? A. That is right.

Q. So then it was moved over to the fortifying room and placed in a tank there? A. Yes.

Q. Is that tank sealed?

A. That tank is also sealed.

Q. Are there any locks attached to it?

A. The valve on the bottom has a device that goes in about two or three feet, and it is possible to lift that up from the tank.

Q. And the brandy or the distilled spirits of brandy is then [107] gauged and proofed at that point, is it? A. Yes.

Q. Before it is permitted to be released for fortification purposes? A. That is right.

Q. And then where does the distilling material go after that time, that is, the brandy.

A. Well, after it is gauged, he takes a reading of the brandy and he makes the fortification to bring it to a certain proof, and after that is finished

(Testimony of Guido Granucci.)

he opens the lock and admits the brandy into the fortifying tank.

Q. You mean there are pipes attached to other containers?

A. There is a valve that dumps right into the fortifying tank.

Q. And in the fortifying tank this brandy goes?

A. Yes.

Q. And then from there is removed where?

A. Back to the winery.

Mr. Fouke: No further questions.

Cross-Examination

Mr. Guerard: I believe you testified that you were not familiar with the operation of this still.

A. I am not.

Q. So all of the methods of procedure that you have talked about right now and just have testified to are hearsay, are they not?

A. Well, I have watched it.

Q. You can tell how you believe it is operated?

A. No, I have watched.

Q. You have watched, but not operated, yourself? A. Not distilled.

Q. You say you never worked in the distillery?

A. No.

Q. Except as a clerk, in December, 1936?

A. That is right. [108]

Q. And that you are now the secretary?

A. That is right.

Q. Now, at that time you were in charge of all

(Testimony of Guido Granucci.)

the records that were kept at the Livermore Winery? A. That is right.

Q. You kept all of the records? A. Yes.

Q. And do you know the contents of tank No. 2 on the night of December 26th?

A. I think 2200, I think it is around 2200 gallons.

Q. You were not there on December 26th?

A. No.

Q. You were not there on December 27th?

A. No.

Q. You were not there on December 28th and you don't know what happened?

A. That is right.

Q. With reference to this particular brandy on any of those days? A. That is right.

Q. That is correct? A. That is correct.

Mr. Guerard: That is all.

The Court: We will take a recess now until two o'clock.

(A recess was thereupon taken until 2:00 o'clock p. m.) [109]

Afternoon Session

Mr. Fouke: If your Honor please, certain witness whom we had expected to have available are not available, and therefore I will conclude our case by having Mr. Groci sworn merely to refute, and for that special purpose, statements of Mr. Bulfinch.

GUISEPPE GROCI,

called as a witness for the defendants; sworn.

The Clerk: Q. Will you state your name to the court, please?

A. Guiseppe Groci.

Mr. Fouke: Q. Mr. Groci, did you have any conversation, or was there any conversation in your presence and in the presence of Mr. Bulfinch, who has already testified, and Mr. Browning on December 26, 1936—Saturday, December 26, 1936?

A. I was not in Livermore.

Q. Did you have any conversation with them, or was there any conversation had in your presence?

A. No.

Q. When they were present? A. No.

Q. Now, repeating the same question as to Monday, December 28th, did you have any conversation with either or both of those men, or was there any conversation had in your presence? A. No.

Q. When they were present? A. No. [110]

Q. Where were you on December 28, 1936, if you know? A. In San Francisco.

Q. Did you have any conversation with Mr. Bulfinch or Mr. Browning on December 27th, 1936?

A. No.

Q. Was there any conversation had in your presence at which other persons were present, including Mr. Browning and Mr. Bulfinch?

A. No, I never had any.

Q. Were you at the Livermore Winery on December 27, 1936? A. Yes.

(Testimony of Guiseppe Groci.)

Q. How do you know that you were at the Livermore Winery on December 27, 1936?

A. I know because somebody called me up in San Francisco and told me there was some trouble in the distillery, so I called up Mr. Boone.

Q. Who is Mr. Boone?

A. Mr. Boone is in the Alcohol Tax Unit, I know him, and I told him there was some trouble up in the winery and I wished he would send somebody up there.

Q. What did Mr. Boone say?

A. Mr. Boone said, "It is pretty hard to get any inspector, I will try, and if I can I will call you back in fifteen or twenty minutes," and in fact he called me back.

Q. What did he tell you when he called back?

A. He told me he had an agent on the way already, and for me to go out.

Q. Did you go out? A. I went out.

Q. Other than on that day were you at the Livermore Winery on either December 26 or December 28? A. No.

Mr. Fouke: No further questions. [111]

Cross-Examination

Mr. Guerard: Q. Mr. Groci, you are vice-president, are you, of the Livermore Winery?

A. Yes.

Mr. Fouke: Just a minute. I move that the answer be stricken as improper cross-examination, in that he has not testified to that on direct examination.

(Testimony of Guiseppe Groci.)

The Court: Objection overruled. He may answer.

Mr. Fouke: Exception noted.

A. Yes.

Mr. Guerard: Q. You were not at the winery on December 26, 1936?

Mr. Fouke: Again I object to the question on the ground it has already been asked and answered.

The Court: He is not bound by your answer. He is under cross-examination.

Mr. Fouke: That is right.

A. No.

Mr. Guerard: Q. How do you know you were not?

A. Because I know I was in San Francisco. I remember now, because they called me up the next day on account of trouble, the next morning.

Q. They called you up. Who called you up?

A. From the winery.

Q. Who at the winery?

A. The winery at Livermore.

Q. But what person called you?

A. Somebody from the winery called me up.

Q. You don't know who it was?

A. I do not recall the name. They said there was some trouble at the winery.

Q. That was on December 27th?

A. December 27th.

Q. Then you testified you called Mr. Boone, who is connected with the Internal Revenue Department? A. I did.

(Testimony of Guiseppe Groci.)

Q. How do you know it was Mr. Boone?

A. Because I know him; I know him a long time.

Q. Did you recognize his voice?

A. Well, I called for Mr. Boone, and he said, "This is Mr. Boone on the telephone."

Q. But you don't know Mr. Bonne's voice do you? A. Sure I know.

Q. You don't know what Mr. Boone you talked to?

A. Mr. Boone is now in the Alcohol Tax Department.

Q. But there might be several Mr. Boones there. Which Mr. Boone are you referring to?

A. He is the supervisor of something, I don't know exactly what it is, but he is in the Alcohol Tax Unit.

Q. He told you to go out there?

A. I called him from San Francisco, I called Mr. Boone, and Mr. Boone came on the phone.

Q. What did he tell you to do about it?

A. I told him there was trouble at the winery at Livermore, in the distillery, and I told him if it is possible I don't want any trouble, to send some inspector out. He said on Sunday it is impossible, I don't know where to get him. He said, "I will call you back if I can get him." So in about fifteen or twenty minutes he [113] called me back.

Q. Do you know Mr. Bulfinch?

A. Well, I met him on the 27th at the winery.

Q. Did you meet Mr. Browning on the 27th?

(Testimony of Guiseppe Groci.)

A. Mr. Browning, yes, was there.

Q. Mr. Browning and Mr. Bulfinch were both there on the 27th? A. Yes.

Q. Was Mr. Antonini there? A. No.

Q. He was not there?

A. No, Mr. Antonini was not there.

Q. What was the nature of the business transacted between you and Mr. Browning and Mr. Bulfinch?

Mr. Fouke: I object to that question, that was no part of the direct examination.

Mr. Guerard: Q. Did you have any conversation with those men, at all? A. No.

Q. No conversation, at all?

A. No, nothing.

Q. You are sure of that? A. Yes.

Mr. Guerard: That is all.

Mr. Fouke: No further questions.

The Court: Is that the case?

Mr. Fouke: The defendants rest.

Mr. Guerard: We have nothing in rebuttal. What do you propose to do now, Counsel?

Mr. Fouke: I propose at this time, if your Honor please, to make a motion to strike one of the exhibits from the record, [114] Plaintiff's Exhibit 5.

The Court: There is only one item in that, as I remember it.

Mr. Guerard: That is correct.

The Court: The motion will be denied. There

is only one item there, and that is all that was offered, that one portion of it.

Mr. Fouke: They offered the whole thing.

Mr. Guerard: Yes. The photostatic copy which we introduced had attached to it that which related to this particular transaction. The original consisted of eighteen items and we only photostated the item relating to this particular transaction.

The Court: For that limited purpose I will allow it.

Mr. Fouke: The basis of it is that this exhibit is not a photostatic copy.

The Court: The motion will be denied.

Mr. Fouke: Might the record also show upon the further ground that no foundation has been laid for the introduction of the assessment certificate, or any of the information therein contained.

The Court: Very well.

Mr. Fouke: Now, then, if your Honor please, at this time I would like to make a motion for judgment in favor of the defendants by reference without at this time going over the points I made in connection with the motion, that is, the motion to [115] strike out, and also the motion for judgment at the time that plaintiff rested its case. And in addition to that I would like to state that plaintiff has failed to introduce any evidence to establish the allegations contained in either the first or second causes of action indicating, first, that there was a removal of any distilled spirits from the premises in question, the evidence being confined to the fact

that were distilled spirits on the floor of the distillery premises and not elsewhere.

The Court: He answers that by saying it was manufactured.

Mr. Fouke: But as to that our position is that on the one hand a tax may attach but a tax is not due and payable until removed from the distillery premises, and it is only at that time, under the statute, and under the cases, that a tax becomes due and payable; therefore, that being the case, there is no basis for an assessment, or a levy, or any other action on the part of the Government, because the statute does not authorize or provide any such action in connection with this particular statute upon which the complaint is based.

In addition to the first point, then, that the spirits were not removed, the second point, namely, that there was no computation or method of computation of arriving at the quantity of distilled spirits alleged to have been manufactured, has not been set forth in the evidence, and is not available nor capable of ascertainment upon the computation, because, as the evidence has indicated, there was a series of tanks as to [116] which nothing was done or no gauging or computation was made as to the quantity of material in them. In short, an arbitrary figure was taken.

(After argument the case was submitted upon briefs to be filed.)

[Endorsed]: Filed Aug. 21, 1945. [117]

[Endorsed]: No. 11145. United States Circuit Court of Appeals for the Ninth Circuit. The Saint Paul Mercury-Indemnity Company of Saint Paul, a Delaware Corporation of Saint Paul, Minnesota, and Livermore Winery, Incorporated, a California corporation, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed September 24, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11145

UNITED STATES OF AMERICA,
Plaintiff and Appellee,

vs.

THE SAINT PAUL MERCURY-INDEMNITY COMPANY OF SAINT PAUL, a Delaware Corporation, of Saint Paul, Minnesota, and LIVERMORE WINERY, INCORPORATED, a California corporation,
Defendants and Appellants.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY UPON APPEAL

On this appeal, Appellants intend to rely upon the following points:

(1) In that the facts found by the Trial Court do not support its conclusions of law;

(2) In ordering judgment to be entered in favor of the plaintiff and against the defendants;

(3) In impliedly finding that there was removed on December 26th and December 27th, 1936, from the distillery premises of defendant Livermore Winery, Incorporated, a California corporation, 1619.56 proof gallons of brandy. There is no evidence to support such finding.

(4) In finding that 1,677.02 proof gallons were removed on December 4, 1936, leaving on hand 2,901.63 proof gallons of distilled brandy on said Livermore Winery premises on December 26, 1936. There is no evidence to support such finding.

(5) In impliedly finding that the "person" referred to in Finding number 6 was an employee of the Livermore Winery, Incorporated, and had attached a water hose to the distilling material line and turned the water into the still to wash it, but failed to open the stop-line valve. There is no evidence to support such finding.

(6) In impliedly finding that on the morning of December 27, 1936, Receiving Tank No. 2 was overflowing with a mixture of water and brandy. There is no evidence to support such finding.

(7) In impliedly finding that on December 27, 1936, Receiving Tank No. 2 contained 2,159.1 wine gallons of the water and brandy mixture with an alcoholic content of 51 proof, making a total of 1,101.4 proof gallons of brandy, of which 765 wine gallons were recovered from the distilling material sump, having an alcoholic content of 20 proof, or a total of 153 gallons of brandy, and that the total of said water and brandy mixture made a grand total of 1,254.14 proof gallons of diluted brandy on hand on December 27, 1936. There is no evidence to support such finding.

(8) In impliedly finding that 1,619.56 proof gallons of brandy were lost through negligence

December 26th and 27th, 1936. There is no evidence to support such finding.

(9) In impliedly finding that on May 4th and May 15th, 1937, the Collector of Internal Revenue served notice and demand for payment of the tax upon the Livermore Winery, Incorporated.

(10) In impliedly concluding that there had been a removal of 1619.56 proof gallons of distilled brandy from the distillery premises and that a tax of $2.00 per proof gallon on the 1619.56 proof gallons of brandy, in the sum of $3,239.00, became due and payable on December 27, 1936. Such conclusion is supported by neither the findings, the evidence nor the law.

(11) In impliedly concluding that the loss of the 1619.56 proof gallons of distilled brandy was caused through the negligence of Livermore Winery, Incorporated, and not by casualty. Such conclusion is supported by neither the findings, the evidence nor the law.

(12) In impliedly concluding that the assessment made by the Commissioner of Internal Revenue on 1619.56 proof gallons of brandy assertedly lost through negligence December 26th and 27th, 1936, was lawfully and correctly made. Such conclusion is supported by neither the findings, the evidence nor the law, and is contrary to the evidence.

(13) In impliedly concluding that defendants are jointly and severally indebted to plaintiff in

the sum of $3,239.00, together with a penalty of 5% thereon in the amount of $161.95, and interest on the said $3,239.00 at the rate of 6% per annum from May 4, 1937, to date hereof in the sum of $1,530.43. Such conclusion is supported by neither the findings, the evidence nor the law.

(14) In its rulings as to the admissibility of certain evidence to which objections were properly made or to which motions to strike were properly made and denied, particularly:

(a) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 5, purporting to be a certified copy of Assessment Certificate, and plaintiff's Exhibit No. 6, purporting to be an original Certificate of Assessment, and overruling defendants' objections to the admission of said Exhibits in evidence and testimony relating thereto;

(b) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 7, purporting to be a notice and demand for tax, and overruling defendants' objection to the admission of said Exhibit in evidence and testimony relating thereto;

(c) In admitting in evidence over defendants' objection plaintiff's Exhibit No. 4, purporting to be a photostatic copy of a letter dated December 30, 1936, assertedly signed by Mr. Antonini, president of Livermore Winery, Inc., and overruling defendants' objection to the admission of said Exhibit in evidence and testimony relating thereto;

(d) In admitting in evidence over defendants'

objection an alleged conversation or statements allegedly made by Mr. Renteria to Mr. Bulfinch on December 28, 1936, at Livermore, California, and testimony by Mr. Bulfinch as an alleged expert regarding the still and its probable operation, located on the Livermore Winery Distillery premises;

(e) In admitting in evidence over defendants' objection testimony of Mr. Bulfinch relating to his calculation of the alleged loss of brandy and records in connection therewith; and

(f) In requiring defendants to proceed with the cross-examination of witness Arthur F. Bulfinch without production of the plans by plaintiff as to which said witness had testified in his direct examination, for purposes of cross-examination, in order to establish or contradict the testimony of such witness, which plans were then in the possession and under the control of plaintiff.

(15) In denying defendants' motion for dismissal of the action or judgment in favor of defendants upon the conclusion and submission of the case of plaintiff;

(16) In denying the motion of defendants for entry of judgment in favor of the defendants upon the conclusion and submission of the entire case;

(17) In denying defendants' motions to strike from the record plaintiff's Exhibits 1, 4, 5, 6 and 7.

Dated: September 25th, 1945.

ROBERT H. FOUKE,

HANS A. KRUGER,

Attorneys for Appellants.

Service of the within Statement of Points on Appeal by copy, admitted this 25th day of September, 1945.

FRANK J. HENNESSY,

Attorney for Appellee.

By ALBERT S. GUERARD.

[Endorsed]: Filed September 25, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellants designate the entire record as necessary for the consideration of this proceeding, as certified by the Clerk of the United States District Court.

Appellants designate and respectfully request the printing of the Transcript of Record on Appeal, prepared by the Clerk of the District Court, excluding therefrom certain voluminous exhibits which, pursuant to Stipulation and Order are au-

thorized to be incorporated by reference but eliminated from the printed record.

Dated: September 25th, 1945.

ROBERT H. FOUKE,
Attorney for Appellants.

Received copy of foregoing Designation this 25th day of September, 1945.

FRANK J. HENNESSY,
Attorney for Appellees.

By ALBERT S. GUERARD.

[Endorsed]: Filed September 25, 1945. Paul P. O'Brien, Clerk.